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In The

Supreme Court of the United States

October Term, 1996

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH, III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the panel held that after a state court class action had been settled, the *Rooker-Feldman* doctrine deprived a federal district court of subject matter jurisdiction over class members' claims – of violations of the Racketeer Influenced and Corrupt Organizations Act and the Civil Rights Act of 1871, and of common law fraud, attorney malpractice, conversion, fraudulent concealment, negligent misrepresentation, and breach of fiduciary duty – *even if* the state court judgment was entered without personal jurisdiction over the class members, in violation of their due process rights, and would not be entitled to full faith and credit. The questions presented are:

1. Did the panel err in holding that, whether or not the state court had personal jurisdiction over the plaintiff class members or otherwise violated their due process rights, the *Rooker-Feldman* doctrine deprived the federal district court of subject matter jurisdiction?

2. Does the *Rooker-Feldman* doctrine preclude class action litigants from bringing actions for fraud and malpractice against their lawyers?

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PETITION FOR A WRIT OF CERTIORARI

This petition for a writ of *certiorari* involves fundamental questions concerning the due process rights of class members, the relationship between state and federal courts, and the jurisdiction of federal courts. Plaintiffs' federal court complaint alleged a massive fraud perpetrated upon them during and after the settlement of a nationwide class action in Alabama state court. This alleged fraud, committed by lawyers representing a class of which plaintiffs were members and by the defendants and their attorneys in the Alabama action, resulted in the taking of money from the class members' own escrow accounts to pay attorneys' fees. The result of the fraud was that most, if not all, class members were left with a net out-of-pocket loss. As part of the malfeasance, the absent class members had their property taken from them without due process and were deprived of their constitutional rights to meaningful notice, adequate representation, and an opportunity to opt out of the Alabama action.

Holding that the complaint would require it to review what had happened in the Alabama state court, the district court dismissed it for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.[1] A panel

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[1] The *Rooker-Feldman* doctrine stands for the proposition that this Court is the only federal court authorized to review a state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine derives from 28 U.S.C. § 1257, which vests review of final judgments of state courts exclusively in this Court. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989) ("[t]he *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is

of the Seventh Circuit Court of Appeals affirmed. Five judges of the court of appeals dissented from that court's denial of a petition for rehearing *en banc*, and, in their opinion *sur* the denial of rehearing, declared that the panel's opinion could not be reconciled with this Court's precedent holding that absent class members cannot be bound by a class action judgment rendered in the absence of meaningful notice, adequate representation, and an opportunity to opt out. According to the dissenting judges, such a judgment cannot bar plaintiffs' claims in federal court under the *Rooker-Feldman* doctrine.

Certiorari is warranted because the panel's ruling squarely conflicts with the decisions of this Court, with the decisions of other courts of appeals, and with the constitutional principle that a judgment entered without personal jurisdiction is null and void. By elevating the *Rooker-Feldman* doctrine over this constitutional principle, the panel in effect makes the *Rooker-Feldman* doctrine an exception to this Court's due process jurisprudence, rendering a state court judgment that would not be entitled to full faith and credit in any other court unassailable in federal court. The panel's opinion also creates a conflict among the courts of appeals, the majority that have reached the issue having held, in contrast to the Seventh Circuit, that class action litigants can maintain fraud and malpractice actions against their lawyers.

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vested solely in this Court"); *see also Johnson v. DeGrandy*, 512 U.S. 997, 114 S. Ct. 2647, 2654 (1994) (describing the "*Rooker-Feldman* abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal rights").

OPINIONS BELOW

The opinion of the court of appeals (A. 1-15) is reported at 92 F.3d 506. The opinion dissenting from the denial of the petition for rehearing *en banc* (A. 35-48) is reported at 100 F.3d 1348. The opinion of the district court (A. 16-34) is not reported, but can be found at 1995 U.S. Dist. LEXIS 18973 or 1995 WL 758422.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A timely petition for rehearing was filed on August 22, 1996, and denied on November 22, 1996. A. 35. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of *certiorari* where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Dexter and Gretchen Kamilewicz, who reside in Maine, and Martha Preston, who resides in Wisconsin ("the *Kamilewicz* plaintiffs"), were among several hundred thousand class members allegedly defrauded by the lawyers purporting to represent them, by their bank, and by the bank's lawyers in the settlement of a class action in Alabama state court. The class members had money taken from their own mortgage escrow accounts to pay legal fees to the attorneys who were supposedly representing them in the class action. The fees far exceeded the amount – not more than one-third of the economic benefit to the class – that the class action notice told the class members the fees would be, and resulted in most, if not all, class members incurring a net out-of-pocket loss as a result of their inclusion in the class. A. 70-71. For example, Dexter and Gretchen Kamilewicz paid $91.33 in attorneys' fees to recover $2.19. A. 2.

The *Kamilewicz* plaintiffs had been included as class members in a nationwide class action filed by Illinois and Alabama lawyers in Alabama state court against Bank of Boston Corporation ("Bank of Boston") and BancBoston Mortgage Corporation ("BancBoston"). *Hoffman, et al. v. BancBoston Mortgage Corp., et al.*, No. CV-91-1880 (Mobile Cty. Cir. Ct. May 28, 1991) ("the *Hoffman* action"). A. 51, 59. In the *Hoffman* action, the *Kamilewicz* plaintiffs were absent class members from outside of Alabama: they were not named plaintiffs, nor did they otherwise appear. The relief sought in the *Hoffman* action was to recover immediately (rather than at the termination of the mortgages) the excess escrow amounts held in the accounts of approximately 715,000 mortgagors. A. 51, 52. The excess escrow money always belonged to the mortgagors and indisputably would have been returned to them at the

termination of their mortgages – the only issue in the *Hoffman* action was the propriety of BancBoston holding the excess amounts until the mortgages terminated. A. 52.

The Alabama court granted partial summary judgment to the plaintiff class on its breach of contract claim, and settlement ensued. A. 70. Class counsel prepared a form of notice to the class members, describing the action and a proposed settlement, which stated that the settlement was "fair, reasonable, adequate, and in the best interests of the class" and that the attorneys' fees sought were "reasonable" and would "not exceed one-third of the economic benefit" to the class. A. 70-71. The Alabama court approved the notice, and it went to the hundreds of thousands of class members. A. 83. With their information limited solely to what was in the terms of the notice, only 0.4% of the persons who received the notice opted out or objected (and many of these apparently were people who intended to "opt in," not to opt out). A. 85.

The Alabama court approved the settlement, which provided: (a) BancBoston would change its escrow practices; (b) each class member would receive a one-time interest payment in an amount ranging from $0.00 to $8.76; (c) the class members would be refunded any excess escrow money in their accounts; and (d) class counsel would receive attorneys' fees equaling 28% of the total excess escrow funds held by BancBoston in the class members' mortgage escrow accounts. A. 77. The settlement provided that a specific amount for attorneys' fees was to be deducted from each class member's escrow account (A. 77), regardless of whether that class member received any refund or interest payment.

The settlement was implemented: BancBoston credited some class members' accounts with their minimal interest payments; returned to those class members who

had any excess escrow funds the money due; and deducted from each class member's account money to pay the class lawyers. A. 87-89. BancBoston labeled the deductions for attorneys' fees "miscellaneous disbursements" on the class members' annual account statements. A. 88.[2] The result of the settlement was that most, if not all, of the class members lost money because the amounts deducted from their mortgage accounts to pay attorneys' fees exceeded the benefits provided by the settlement, while their attorneys received a total of $8.5 million.

After discovering the fraud that allegedly had been committed, the *Kamilewicz* plaintiffs filed a class action complaint in the District Court for the Northern District of Illinois against the class counsel (two of the three of which reside in Illinois), the banks (which do business in Illinois), and the banks' lawyers. A. 49-105. They alleged that all defendants had conspired to take their money in violation of the Racketeer Influenced and Corrupt Organizations Act and were liable for common law fraud, fraudulent concealment, and negligent misrepresentation; that class counsel also had deprived plaintiffs of their property without due process of law in violation of the Civil Rights Act of 1871, had committed malpractice, and had breached its fiduciary duty to them; and that the bank had converted their money and breached its fiduciary duty by allowing money to be taken from their

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[2] While in their decision dissenting from the denial of rehearing *en banc* in the Seventh Circuit Court of Appeals, the dissenters assumed that "[e]verything the Bank did to affect Kamilewicz's interests was authorized by the judgment based on the settlement," (A. 37-38), BancBoston's failure to explain the reason for the "miscellaneous disbursement" on the class members' account statements was not so authorized.

escrow accounts for reasons not authorized by their escrow agreements.[3]

The district court dismissed the complaint for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, concluding that "the plaintiffs are asking us to undo what the Alabama court did, and that constitutes a[n] impermissible collateral attack upon the state court judgment." A. 31. It reasoned that "[i]f we were to address the merits of the plaintiffs[']] claims, we would have to re-examine documents filed with and approved by the Alabama court, such as the notice of proposed settlement, and we would have to re-open, in effect, the Alabama court's decision regarding the economic benefit to the class and the reasonableness of the award of attorneys' fees." A. 31. Because "[t]he *Rooker-Feldman* doctrine prohibits us from doing any of this," (A. 31), the district court held that it lacked subject matter jurisdiction over plaintiffs' claims.

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[3] After the *Kamilewicz* plaintiffs commenced this action, certain of the defendants took further steps in Alabama state court, a jurisdiction that the *Kamilewicz* plaintiffs contend lacks jurisdiction over them. First, certain of the defendants caused the Alabama state court to issue an order and opinion "preclud[ing] [the *Kamilewicz* plaintiffs] from reasserting the claims dismissed in the Federal Class Action in any forum." A. 118. Second, while this case was pending before the court of appeals, defendant Edelman and his law firm filed suit in Alabama state court against the *Kamilewicz* plaintiffs and their attorneys for malicious prosecution, abuse of process, and tortious interference with contract – all claims based solely on plaintiffs having brought their federal action. *Edelman and Edelman & Combs v. Wildman, Harrold, Allen & Dixon, et al.*, No. CV-96-91 (Mobile Cty. Cir. Ct. Jan. 8, 1996).

Plaintiffs appealed to the Seventh Circuit Court of Appeals. A panel of the Seventh Circuit affirmed the district court's dismissal of plaintiffs' complaint under the *Rooker-Feldman* doctrine. According to the panel, "the proper court for an assertion of fraud in the procurement of a judgment is the one which rendered the judgment." A. 11. It reasoned: "if the injury which the federal plaintiff alleges resulted from the state court judgment itself, then *Rooker-Feldman* controls, and the lower federal courts lack jurisdiction over the claim. It does not matter that the state court judgment might be erroneous or even unconstitutional." A. 8. Responding to plaintiffs' argument that, just as any person is not bound by a default judgment entered against him or her by a court without personal jurisdiction, so absent class members are not bound by a judgment entered against them by a court without personal jurisdiction, the panel responded, without further explanation: "We see significant differences between default judgments and the judgment under attack here. We reject the plaintiffs' far-reaching proposed exception to the *Rooker-Feldman* doctrine." A. 10.

Plaintiffs filed a petition for rehearing. At the court of appeals' direction, defendants responded. Three months later, the panel voted to deny the petition for rehearing, and a majority of the active judges of the court voted to deny rehearing *en banc*. A. 35-36. Chief Judge Posner, and Circuit Judges Easterbrook, Manion, Rovner, and Diane P. Wood dissented from the denial of the petition for rehearing *en banc*. A. 36-48.

Judge Easterbrook, writing for the dissenting judges, emphasized the fundamental and irreconcilable conflict between the panel's decision and the decisions of this Court, including *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Hansberry v. Lee*, 311 U.S. 32 (1940), which

hold that "[c]lass members are not bound when a state court exceeds its jurisdiction. . . . Lack of jurisdiction and unconstitutional procedures are recognized grounds for disregarding a judgment in a class action." A. 38. According to the dissenting judges, these constitutional principles apply regardless of whether it is a federal court or a state court that is being asked to disregard an unconstitutional judgment and regardless of whether the unconstitutional judgment was rendered by a state or federal court:

> When *Hansberry v. Lee*, 311 U.S. 32 (1940), held that a judgment rendered without personal jurisdiction over members of the class is not entitled to full faith and credit, the Justices did not add: "except in federal court." . . . [A] judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine.

A. 39-40. Judge Easterbrook and the other dissenters also declared that plaintiffs' attorney malpractice claim should not have been dismissed for the additional reason that malpractice claims are "not a collateral attack on a judgment," and thus "[t]he *Rooker-Feldman* doctrine . . . does not apply to malpractice suits." A. 41, 42.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for the following reasons: (1) to make clear that a judgment entered against a person by a state court without personal jurisdiction is not to be given effect by the federal courts through the *Rooker-Feldman* doctrine; and (2) to resolve a conflict among the circuits about whether class action litigants may, like all other litigants, bring actions for fraud and malpractice against their lawyers. By relying

on the *Rooker-Feldman* doctrine as an absolute bar to consideration of the state court judgment with respect to the plaintiff class, the panel committed a major error of federal law.

The panel's decision upsets basic tenets of our constitutional system. The principle that judgments entered against absent persons by courts without personal jurisdiction are null and void to affect the rights of those persons is as old and as central a principle as exists. The Alabama court lacked jurisdiction over the *Kamilewicz* plaintiffs both because: (1) a state court lacks the power to enter an order depriving non-residents who do not have minimum contacts with the state of their property; and (2) a state court lacks the power to adjudicate the rights of absent class members in the absence of meaningful notice, adequate representation, and, in a damages class action, an opportunity to opt out.

Yet the panel below permitted this very judgment of the Alabama court – a judgment permitting property to be taken from persons by a court they contend lacked personal jurisdiction over them – to operate to close the doors of the federal court. The panel's decision is in conflict with the decisions of this Court, from *Pennoyer v. Neff*, 95 U.S. 714 (1877), through *Hansberry v. Lee*, 311 U.S. 32 (1940), from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Johnson v. DeGrandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994). The panel's decision requires federal courts to honor state court judgments entered without personal jurisdiction and without the minimal due process protections that must be provided those absent from state court proceedings. Under the panel's decision, judgments heretofore considered null and void become

powerful enough to extinguish a person's right to petition for relief in federal court.

The panel's decision also creates a conflict among the circuits whether class action litigants are precluded from bringing actions for fraud and malpractice against their lawyers. If the panel is right, then it would follow, as Judge Easterbrook pointed out (A. 42, 47), that *Rooker-Feldman* precludes federal courts from hearing any malpractice case arising out of class actions (and perhaps all actions) in state courts because the details of the state court proceeding would be before the federal courts – a result squarely in conflict with the decisions of other courts of appeals.

The panel's decision thus effectively immunizes class action lawyers in state court from malpractice suits in federal court. And it does so despite the well-documented dangers inherent in class actions, described as follows by Judge Easterbrook:

> Representative plaintiffs and their lawyers may be imperfect agents of the other class members – may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means it lacks essential information. This possibility, a staple of the literature about class actions, enjoys judicial recognition.

A. 46 (citations omitted).

I. THE PANEL DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, WITH DECISIONS OF OTHER COURTS OF APPEALS, AND WITH THE CONSTITUTIONAL PRINCIPLE THAT PERSONS CANNOT BE BOUND BY A STATE COURT JUDGMENT ENTERED IN THE ABSENCE OF JURISDICTION OVER THEM.

In essence, the panel elevated the *Rooker-Feldman* doctrine over fundamental principles of due process. Rejecting plaintiffs' arguments that they cannot be bound by a judgment entered by a state court that had no jurisdiction over them, the panel explicitly held that *Rooker-Feldman* applies even if the state court judgment is "unconstitutional." A. 8. In this respect, the panel's decision stands in sharp conflict with the decisions of this Court and with the decisions of other courts of appeals.

A state court has no power to deprive a person of property in the absence of personal jurisdiction over that person. *Pennoyer v. Neff*, 95 U.S. 714 (1877). In both *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the state court unquestionably had personal jurisdiction, a point this Court made explicit in *Rooker* itself. *See Rooker*, 263 U.S. at 415 ("[i]t affirmatively appears from the bill [in equity] that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties"); *id.* at 416 ("[a] reading of the entire bill shows indubitably that there was full jurisdiction in the state courts and that the bill at best is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction"). Yet by invoking the *Rooker-Feldman* doctrine, the federal court here refused even to consider the jurisdictional basis of the Alabama judgment.

According to the allegations of the *Kamilewicz* plaintiffs' complaint, the Alabama court had no jurisdiction over them because: (1) a state court cannot, without minimum contacts, deprive absent, out-of-state persons of their property; and (2) the rights of absent class members cannot be determined by a state court judgment entered in the absence of meaningful notice, adequate representation, and an opportunity to opt out. Thus, far from barring the *Kamilewicz* plaintiffs' federal claims, the Alabama judgment cannot bind the *Kamilewicz* plaintiffs in any way and should have been given no effect.

A. A State Court Cannot, Without Minimum Contacts, Deprive Absent, Out-of-State Persons of Their Property.

The *Kamilewicz* plaintiffs and the other potential class members who did not reside in Alabama lacked minimum contacts with Alabama. Accordingly, even if the constitutionally-mandated procedural requirements to asserting jurisdiction over absent class members had been satisfied (and, as discussed below, they were not), the state court could not constitutionally impose a liability on the absent, out-of-state class members. This is precisely what the *Kamilewicz* plaintiffs allege the state court did by ordering money they indisputably owned to be taken out of their own accounts, leaving most, if not all, of them with a net out-of-pocket loss as a result of the Alabama action.

This Court made clear in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that the only reason jurisdiction can be exercised over out-of-state class members without minimum contacts is because they are not being haled into a distant court to defend themselves or to be made subject to counterclaims or damages. *Id.* at 810-12.

In other words, a state court's exercise of personal jurisdiction over out-of-state class members who do not have minimum contacts with the state is predicated on the forum state's not imposing a burden or a liability on them. *Id.* According to this Court, the *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), minimum contacts protection required for a defendant, who is "faced with the full powers of the forum State to render judgment *against* it," *Shutts*, 472 U.S. at 808 (emphasis in original), is unnecessary for a class plaintiff because "[t]he burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant." *Id.*

Here, however, as a result of the alleged deceptive conduct, the Alabama court imposed a liability on most, if not all, of the class members when it required them to pay class counsel an amount that exceeded any benefit they received. For that reason, they became, in essence, defendants in the Alabama action. Significantly, one basis for the district court's holding was its finding that the *Kamilewicz* plaintiffs were "cast in the role of defendants" in the action (A. 30), a finding that the Seventh Circuit concluded "has some support in logic and bolsters a finding of a *Rooker-Feldman* bar." A. 13. *See also* A. 40 (Easterbrook, J., dissenting from denial of petition for rehearing *en banc*) ("[i]n effect, though not in name, this was a defendant class, attempting (unbeknownst to its members) to fend off predatory lawyers' claims to the balances in the escrow accounts").

Under *Shutts*, regardless of the existence or lack of the consent assumed by the procedural protections of notice, representation, and an opportunity to opt out, the state court lacked jurisdiction to deprive persons of their property. In other words, *Shutts* did not authorize state

courts to create out-of-state defendant classes. *See In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). *See generally* Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 609 (1987) ("the consent theory of *Shutts* . . . is absolutely unacceptable for defendant class actions").

In sum, because a state court cannot, without minimum contacts, deprive absent, out-of-state persons of their property, the Alabama court lacked jurisdiction over the non-Alabama members of the proposed *Kamilewicz* class and they cannot be bound by the Alabama judgment. Moreover, the Alabama court lacked jurisdiction over the *Kamilewicz* class for the additional reason that, as set forth below, none of the constitutionally-mandated prerequisites to binding absent class members was satisfied here.

B. The Rights of Absent Class Members Cannot Be Determined by a Judgment Entered in the Absence of Meaningful Notice, Adequate Representation, and an Opportunity To Opt Out.

It is a fundamental tenet of American law that every individual is entitled to his or her day in court. Class actions are consistent with this basic principle, but solely because class members may be bound by judgments only when the court had jurisdiction and the class members' due process rights have been protected. *See Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985); *Hansberry v. Lee*, 311 U.S. 32 (1940). In the class action context, the due process inquiry is informed by this Court's holding in *Shutts* that:

"[i]f the forum State wishes to bind an absent plaintiff[4] concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protections," which include "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel," and "an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 811-12 (citations omitted). Each of these procedural protections is integral to the maintenance of a class action, and, according to the allegations of the complaint, each was lacking in the Alabama action.

The notice to be given to absent class members must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Shutts*, 472 U.S. at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)). *See Notes of Rules Advisory Committee to 1966 Amendments to Rule 23*, 39 F.R.D. 95, 107 (1966) ("[t]his mandatory notice . . . is designed to fulfill

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[4] It is somewhat unclear whether in *Shutts* the Court meant the term "absent plaintiffs" to be synonymous for jurisdictional purposes with out-of-state class members, or, rather, as the term "absent plaintiff" is commonly used, as meaning those class members who are neither named as class representatives nor appear as objectors, regardless of where they reside. *See* 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions*, § 1.16, at 42-44 (3d ed. 1992). Even if the Court meant the former, it would not change the analysis in this case because due process itself insists on more than minimum contacts before a court can divest a person of property: notice and an opportunity to be heard also are constitutionally-mandated prerequisites to depriving persons of their property.

requirements of due process to which the class action procedure is of course subject"). By telling class members falsely that their attorneys would receive not more than one-third of the economic benefit to the class and by not advising class members that most, if not all, of them would suffer a net out-of-pocket loss as a result of the settlement, the notice in the Alabama action fell far short of the constitutional requirements. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (finding notice sent to over 600,000 truck owners deficient because it did not set forth the maximum amount of attorneys' fees sought by class counsel and did not specify the method of calculating attorneys' fees).

Also central to the constitutionality of binding absent class members to a judgment is that "the named plaintiffs at all times adequately represent the interests of the absent class members." *Shutts*, 472 U.S. at 812. This requirement applies equally to class counsel as to the named class representative, *see In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), and it applies equally to in-state and out-of-state class members, *see Hansberry v. Lee*, 311 U.S. 32 (1940). Only last Term, Justice Ginsburg "stress[ed] . . . the centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement." *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 890 (1996) (Ginsburg, J., concurring in part and dissenting in part). The very essence of the *Kamilewicz* plaintiffs' complaint is that their own attorneys participated in a scheme to defraud them to maximize the attorneys' own fees – an allegation diametrically at odds with the adequate representation requirement.

Finally, without meaningful notice or adequate representation, class members' opt-out rights by definition are violated, for they cannot know what they are choosing to opt in or out of. *See* A. 38 (Easterbrook, J., dissenting from denial of petition for rehearing *en banc*) ("[a] deficient notice means that the class members' right to opt out was defeated, which has jurisdictional consequences of its own"). *See generally* George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. Rev. 258 (1996).

In short, because none of the constitutionally-mandated prerequisites to binding absent class members was satisfied here, the Alabama court lacked jurisdiction and the *Kamilewicz* plaintiffs' right to sue in federal court cannot be extinguished by that judgment. In addition, as next discussed, the *Rooker-Feldman* doctrine is inapplicable for the additional reason that, due to the inadequate representation, the absent class members were essentially non-parties to the Alabama action.

C. Absent Class Members Who Are Not Adequately Represented Are Essentially Non-Parties to an Action.

Because of the fundamental principle that a judgment does not conclude the rights of strangers to the proceeding, *Rooker-Feldman* does not apply to suits by or against persons who were not parties to the initial case. *See Johnson v. DeGrandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994); *see also Leaf v. Supreme Court of Wisconsin*, 979 F.2d 589 (7th Cir. 1992) , *cert. denied*, 508 U.S. 941 (1993); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973).

In its most recent discussion of *Rooker-Feldman*, this Court held that, despite the fact that a state court had validated a redistricting plan, *Rooker-Feldman* did not bar

the United States from initiating subsequent voting rights litigation based on that plan in federal court because the United States had not been a party to the state case. The Court stated that *Rooker-Feldman* was "inapt" because:

> [U]nlike *Rooker* or *Feldman*, the United States was not a party in the state court. It was in no position to ask this Court to review the state court's judgment and has not directly attacked it in this proceeding. The United States merely seeks to litigate its § 2 case for the first time, and the Government's claims, like those of the private plaintiffs, are properly before the federal courts.

Johnson, 512 U.S. 997, 114 S. Ct. at 2654 (citations omitted). The panel's decision conflicts with *Johnson* because it treats the *Kamilewicz* plaintiffs as parties and penalizes them for failing to appeal the Alabama judgment.

In the class action context, inadequately-represented class members are in effect non-parties. In *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996), this Court unanimously reaffirmed the principle set forth over 50 years ago in *Hansberry v. Lee*, 311 U.S. 32 (1940): it is a violation of due process "to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented." *Richards*, 116 S. Ct. at 1764. Since *Hansberry*, it is clear that absent class members are parties and not strangers to the earlier litigation *only* if they were adequately represented in the earlier proceeding.

It is for this reason that, if they can show that adequate representation was lacking in the first proceeding, absent class members can proceed to relitigate the very matter determined in the first proceeding (and, *a fortiorari*, a related matter, as here), as if they were strangers to the first proceeding. As explained in *Richards*,

"[b]ecause petitioners received neither notice of, nor sufficient representation in, the [earlier] litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property." 116 S. Ct. at 1769; *see also* Restatement (Second) of Judgments § 41 cmt. a (1982) (emphasis added) (if person is inadequately represented, he or she "may avoid being bound *either* by appearing in the action before the rendition of the judgment *or* by attacking the judgment by subsequent proceedings").

Indeed, in the class action context, a due process infirmity such as inadequate notice or inadequate representation makes it virtually impossible for absent class members to launch a challenge to the jurisdiction of the court within the context of the original proceeding. *See Battle v. Liberty Nat. Life Ins. Co.*, 770 F. Supp. 1499, 1512-13 (N.D. Ala. 1991), *aff'd per curiam*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 509 U.S. 906 (1993). Thus, a collateral attack (whether on the judgment, any aspect of the judgment, or any injury flowing from the judgment), in addition to being an absent class member's constitutional right, is often the absent class member's only true option to escape the constitutionally-infirm judgment. In fact, a number of circuits hold that absent class members have no right to appeal a final judgment in a class action unless they are first accorded full rights of intervention. *Gottlieb v. Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992), *cert. denied*, 507 U.S. 908 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987).

Despite the Alabama court's lack of jurisdiction over the *Kamilewicz* plaintiffs and the fact that they were

essentially non-parties to the Alabama action who could not challenge the Alabama judgment by appeal and *certiorari*, the panel of the Seventh Circuit held that the Alabama judgment precludes federal subject matter jurisdiction. As set forth below, this holding is in direct conflict with this Court's precedent and with that of other courts of appeals.

D. Persons Are Not Bound by a State Court Judgment Entered in Violation of Their Due Process Rights and in the Absence of Jurisdiction Over Them and Can Attack or Seek Damages Based on that Judgment in a Subsequent Proceeding.

The panel's opinion that *Rooker-Feldman* precludes federal subject matter jurisdiction even over a state court judgment obtained without jurisdiction is not supported by either *Rooker* or *Feldman*. The panel's radical new reading of the *Rooker-Feldman* doctrine creates a sweeping exception to this Court's due process jurisprudence, and one of fundamental legal significance: where the judgment of a state is involved, due process stops at the door of the federal courthouse. Such a result is, of course, completely antithetical to the very reason for the establishment of federal courts. *See Burgess v. Seligman*, 107 U.S. 20, 34 (1882) ("the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views"); *see also Barrow Steamship Co. v. Kane*, 170 U.S. 100, 111 (1898).

The panel's elevation of the *Rooker-Feldman* doctrine over constitutional principles is both inconsistent with the decisions of this Court and in direct conflict with the

decisions of other courts of appeals. At its core, the panel's decision means that a judgment that otherwise would not be given full faith and credit because the original court lacked jurisdiction is invulnerable solely because of *Rooker-Feldman*. Put another way, the principles of *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982) ("[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment"), and *Underwriters Nat. Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n.*, 455 U.S. 691, 704 (1982) (quoting *Durfee v. Duke*, 375 U.S. 106, 110 (1963)) ("'[a] judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits – had jurisdiction, that is, to render the judgment'"), apply in every court in this land – except in federal court if the judgment at issue is a state judgment.

However, it has been established at least since *Pennoyer v. Neff*, 95 U.S. 714 (1877), that a person cannot be bound by a state judgment entered in the absence of personal jurisdiction. This is true regardless of whether it is a federal court or a state court in which the validity of the judgment is questioned. *See Pennoyer*, 95 U.S. at 733 (federal courts "are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them").

And it also has been established at least since *Hansberry v. Lee*, 311 U.S. 32 (1940), that an absent class member cannot be bound by (and therefore can collaterally attack) a state court judgment entered in the absence of adequate representation. *See Richards v. Jefferson County*, 116 S. Ct. 1761, 1769 (1996). *See also Matsushita Elec. Indus.*

Co., Ltd. v. Epstein, 116 S. Ct. 873, 888 (1996) (Ginsburg, J., concurring in part and dissenting in part) (citing *Hansberry*, 311 U.S. at 40; Restatement (Second) of Judgments § 42(1)(d) & (e) cmts. e & f (1982)) ("[f]inal judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement"); *In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760, 767-69 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

If one cannot be bound by a judgment entered in the absence of jurisdiction, then certainly one cannot be barred under *Rooker-Feldman* from attacking or seeking damages based on that judgment in federal court solely as a result of the existence of the judgment. As Judge Easterbrook emphasized, "[i]t gets the cart before the horse to reject, as barred by a judgment, an effort by the absent class members to show that they were not properly brought into the state case and therefore are not affected by the judgment." A. 45.

This Court's jurisprudence makes evident that *Rooker-Feldman* cannot extend so far. As set forth above, in the very decision that gives the doctrine its name, this Court made clear that the state court had jurisdiction when it entered the judgment. Moreover, in the Court's recent decision in *Matsushita*, despite the fact that the case involved a federal court action attacking the terms on which a state class action had been settled, the Court never once mentioned *Rooker-Feldman*. Rather, the Court simply assumed that federal courts have subject matter jurisdiction over the claims of aggrieved state court absent class members, stating, "[t]o be valid in the rendition forum, and entitled to recognition nationally, a state court's judgment must measure up to the requirements of the Fourteenth Amendment's Due Process Clause." 116 S.

Ct. at 888 (citation omitted). Specifically, although granting full faith and credit to the state court judgment, the majority opinion in *Matsushita* noted that the federal plaintiffs contended that the state court "settlement proceedings did not satisfy due process because the class was inadequately represented . . . in spite of the Chancery Court's express ruling . . . that the class representatives fairly and adequately protected the interests of the class." *Id.* at 880 n.5. The Court concluded, however, that it "need not address the due process claim . . . because it is outside the scope of the question presented in this Court." *Id.* Indeed, the concurring opinion acknowledged that the due process issues remain "open for airing on remand." *Id.* at 890 (Ginsburg, J., concurring in part and dissenting in part).

In addition to being inconsistent with the decisions of this Court, the panel's decision directly conflicts with the decisions of the Fifth Circuit, which expressly has held that *Rooker-Feldman* is no more expansive than full faith and credit and, accordingly, that any attack on a state court judgment that a state court would entertain can be maintained in federal court. In *Gauthier v. Continental Diving Serv., Inc.*, 831 F.2d 559 (5th Cir. 1987), the court, explaining that "*Rooker-Feldman* casts in jurisdictional terms a rule that is very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment," "declin[ed] to apply *Rooker-Feldman* in a way that would require a federal court to give greater deference to a state court judgment than a court of the state in which the judgment was rendered would give it." *Id.* at 561. *See also Davis v. Bayless*, 70 F.3d 367, 376 (5th Cir. 1995).

In sum, the petition should be granted because the panel's application of the *Rooker-Feldman* bar to a state

court judgment that would not be given full faith and credit in any other court is at odds with this Court's precedent.

II. THE PANEL DECISION ERECTS A NOVEL BAR TO MALPRACTICE ACTIONS BROUGHT IN FEDERAL COURT AND IS IN CONFLICT WITH OTHER COURTS OF APPEALS ABOUT WHETHER CLASS ACTION LITIGANTS CAN BRING ACTIONS FOR FRAUD AND MALPRACTICE AGAINST THEIR LAWYERS.

The panel held that *Rooker-Feldman* foreclosed not only the *Kamilewicz* plaintiffs' claims against the banks, but also their fraud and malpractice claims against class counsel. In addition to all the reasons set forth above why the panel's decision is both erroneous and in conflict with the decisions of this Court and other courts of appeals, *certiorari* is warranted for an additional reason involving an important question of federal law on which there is a conflict with decisions of other courts of appeals: whether *Rooker-Feldman* precludes class action litigants from bringing actions for fraud and malpractice against their lawyers.

The *Rooker-Feldman* doctrine simply means that federal district courts lack appellate jurisdiction over state courts. If, as the panel held, *Rooker-Feldman* divests a federal district court of jurisdiction over the *Kamilewicz* plaintiffs' fraud and malpractice claims, it can only be because those actions are appellate-like in nature. However, it is settled law (at least in the non-class action context) that a malpractice action is not appellate-like in nature, but rather, as an action for damages for negligence in the first action, is viable only as long as the judgment in the first action is in place. In addition, if fraud and malpractice actions arising out of conduct in

class actions are appellate-like attacks on the original judgment, then a federal district court would be precluded from hearing any such action, whether the underlying proceeding was brought in state or federal court. On this latter point, whether class action litigants can bring fraud and malpractice actions against their lawyers, there is a conflict among the circuits.

Most recently, the Ninth Circuit in *Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), held directly contrary to the panel's decision. Durkin sued Shea & Gould for breach of fiduciary duty and malpractice in its representation of a defendant company in a class action settlement of a shareholder derivative action. The settlement had been approved under Fed. R. Civ. P. 23 by a federal district court with findings that the notice was "the best notice practicable under the circumstances, . . . the settlement was the product of good faith arm's length negotiations, . . . and the settlement was fair, reasonable and adequate as to the [company] and the [class action plaintiffs]." *Id.* at 1513.

Shea & Gould sought summary judgment, arguing that Durkin should not be permitted to relitigate either the fairness of the settlement or whether the company was adequately represented. *Id.* The trial court rejected that argument, holding that "the prior adjudication of the settlement's adequacy does not collaterally estop a legal malpractice claim challenging the conduct of a party's attorney during the prior action." *Id.* The Ninth Circuit affirmed, emphasizing that the Constitution guarantees a "full and fair opportunity to litigate" and that the issues in the malpractice case were *not* the same as the issues in the class action. *Id.* at 1515-16. It explained, "whether a settlement was 'fair and adequate' for the purposes of Rule 23.1 is not the same issue as whether the settlement

was reasonable in light of alleged malpractice by the participating attorneys." *Id.* at 1516. For that reason, "attorneys are not immunized from malpractice suits simply because they arranged a court-approved settlement." *Id.* at 1518. *See also Bennett v. Gen-Probe, Inc.*, 87 F.3d 1317 (Table), No. 95-55306, 1996 U.S. App. LEXIS 16541 at *3-4 (9th Cir. June 14, 1996) (class member's malpractice action against class counsel did not "endanger or affect the 'fruits and advantages' of the district court's judgment in settling the underlying class action" and so there was no procedural impropriety in "examin[ing] the adequacy of the class settlement . . . insofar as that settlement sheds light on [counsel's] representation of [plaintiff]"), *petition for cert. filed*, 65 U.S.L.W 3354 (U.S. Oct. 28, 1996) (No. 96-678).

The Third Circuit also has held that a Rule 23 class member may have a malpractice claim against class counsel. *Zimmer Paper Products, Inc. v. Berger & Montague*, 758 F.2d 86 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985). And the Eleventh Circuit has stated that it is "unprepared to declare as a matter of law that counsel in a class action suit has no professional obligations except those set out by Rule 23." *Diaz v. Sheppard*, 85 F.3d 1502, 1506 n.5 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3468 (U.S. Dec. 20, 1996) (No. 96-1004). *See also Peters v. National Railroad Passenger Corp.*, 966 F.2d 1483, 1487 n.3 (D.C. Cir. 1992); *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 646 A.2d 195, 199-201 (1994). *Cf. Derrickson v. City of Danville*, 845 F.2d 715, 721 (7th Cir. 1988) (explaining that claim preclusion does not apply to wrongs committed in connection with settling a class action suit, because they did "not grow out of the same 'transaction or occurrence' as the [class action suit itself]").

On the other hand, the panel decision finds support in earlier decisions of the Fifth and Sixth Circuits that regard court approval of the adequacy of a class action settlement under Rule 23 as precluding a subsequent malpractice claim. *See Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); *Laskey v. UAW*, 638 F.2d 954 (6th Cir. 1981). These cases demonstrate the conflict among the circuits requiring resolution by this Court.

The panel opinion brings into question the viability of all future fraud and malpractice actions against class counsel. In fact, the import of the opinion is to foreclose any federal action (assuming the existence of federal question or diversity jurisdiction) for fraud or attorney malpractice occurring in a state court class action and to insulate counsel involved in the state court class action from malpractice liability, even in the most nefarious of circumstances. As the dissenting judges emphasized: "If the panel is right, no malpractice suit growing out of state litigation in which the judge awarded attorneys' fees – maybe no malpractice suit, period – may be brought in federal court, even if all requirements of the diversity jurisdiction have been satisfied." A. 42.

The petition should be granted to make clear that malpractice and fraud actions brought against lawyers are independent actions and not appellate matters in the federal courts, and to resolve the conflict among the circuits about whether class action litigants, like any other litigants, may bring actions for fraud and malpractice against their lawyers.

CONCLUSION

The Seventh Circuit's decision is inconsistent with the long-standing precedent of this Court and is in conflict with the decisions of other courts of appeals. This petition should be granted to make clear that a judgment entered against a person by a state court without personal jurisdiction is not to be given effect in the federal courts through the *Rooker-Feldman* doctrine, and to resolve a conflict among the circuits about whether class action litigants may, like any other litigants, bring actions for fraud and malpractice against their lawyers.

Respectfully submitted,

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Dated: January 23, 1997

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IN THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-1019

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Defendants-Appellees.

Appeal From The United States District Court For The Northern District Of Illinois, Eastern Division.
No. 95 C 6341 - Paul E. Plunkett, *Judge*

ARGUED June 3, 1996 - DECIDED August 8, 1996

OPINION OF THE COURT

Before CUMMINGS, RIPPLE, and EVANS, Circuit Judges.

TERENCE T. EVANS, Circuit Judge.

A class action in Alabama cost Dexter Kamilewicz $91.33 in attorney fees to recover $2.19 on the merits. When he learned of this news, he and the other plaintiffs (his wife and Martha Preston) sued the class action attorneys (as well as certain defendants in the Alabama action) in the District Court for the Northern District of Illinois. There, to add to their chagrin, they ran up against another obstacle—the *Rooker-Feldman* doctrine. This is their appeal from an order dismissing their federal case for lack of subject matter jurisdiction.

Kamilewicz and the other plaintiffs have had mortgages serviced by BancBoston Mortgage Corporation, one of the defendants. They were among an estimated 715,-000 members of a class in a nationwide class action filed in the circuit court for Mobile County, Alabama. The suit—*Hoffman, et al. v. BancBoston Mortgage Corp.*—challenged the manner in which BancBoston calculated the amount of surplus each member of the class was required to maintain in their escrow accounts. Deposits to the

escrow accounts were paid as part of the class members' monthly mortgage payments. There was no question regarding the ultimate ownership of the surplus; it belonged to the mortgagor and was to be returned when the mortgage debt was satisfied. The issue in the lawsuit was the propriety of BancBoston's holding the surplus until the time it would be returned to the mortgagor.

In October 1993, the Alabama court granted partial summary judgment in favor of the plaintiff class. The court found that BancBoston's practice was, in fact, inconsistent with the terms of the mortgages. Then in October 1995, counsel for the class prepared a notice of a proposed settlement of the suit. The notice stated that the settlement was "fair, reasonable, adequate, and in the best interests of the class" and that the attorney fees sought were "reasonable" and would "not exceed one-third of the economic benefit" to the class. Bank of Boston—one of the defendants—objected to the notice because it failed to advise the class that there were "substantial adverse effects," to the proposed settlement.

Those perceived adverse effects were that if BancBoston were ordered to refund the escrow surplus and if the attorneys for the class were to seek attorney fees out of the refund, some class members would suffer an out-of-pocket loss as a result of the lawsuit. It should be noted here that the

Bank of Boston and BancBoston had offered, prior to the grant of partial summary judgment in 1993, to settle the litigation. As part of that proposed settlement, the bank and BancBoston would have had to pay $500,000 in attorney fees out of the banks' own funds, and the entire amount of the escrow refund would have gone to the class members.

Nevertheless, the Alabama court approved the proposed notice and held a fairness hearing on January 10 and 11, 1994. On January 24, 1994, the court approved the settlement under which the class members received one-time interest payments ranging from $0.00 to $8.76. The court also found the attorney fees reasonable. The fee award was a percentage of the escrow accounts, or, the complaint in the present case asserts, in excess of $14 million. The fact may be that the award was closer to $8,500,000, but because in either event we are talking about significant amounts of money, the actual amount is not material and, of course, the allegations of the complaint are accepted as true at this point in the litigation. Under the settlement, BancBoston deducted attorney fees from the class members' escrow accounts. The deduction was recorded on the 1994 annual tax and interest statements as a "miscellaneous disbursement." In most cases, the "miscellaneous disbursement" was more—far more—than the interest refund. It was this statement that, understandably, caught Mr. Kamilewicz's eye.

Unhappy with the peculiar result of the class action suit in Alabama, Mr. and Mrs. Kamilewicz and Ms. Preston filed the present federal class action against the bank and the mortgage company, and the plaintiffs' attorneys in the Alabama action. The complaint contained allegations of violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, and of the Civil Rights Act, 42 U.S.C. § 1983, as well as claims of common law fraud, negligent misrepresentation, attorney malpractice, breach of fiduciary duty, and conversion. In turn, the defendants in the federal case filed a motion with the Alabama court seeking an order directed to the Kamilewicz plaintiffs to show cause why they were not bound by the January 1994 order of that court. A hearing was scheduled in Alabama, to which the Kamilewicz plaintiffs sent an attorney for the purpose of stating that they would not participate in the hearing because they contested whether Alabama had personal jurisdiction over them. On January 30, 1996, the Alabama court reaffirmed the order of settlement.

Meanwhile, back in Chicago, on December 15, 1995, Judge Paul Plunkett of the Northern District of Illinois, had entered his order dismissing the federal case for lack of subject matter jurisdiction. He found that even though the federal case was "dressed up" as a claim for RICO damages or

for attorney malpractice, it was, nevertheless, a collateral attack on a state court judgment which would require that he consider issues "inextricably intertwined" with the state court case. This he was prohibited to do, he concluded, under the doctrine known as *Rooker-Feldman.*

We review *de novo* his decision on a motion to dismiss the complaint, taking all well-pleaded allegations as true, and we draw all reasonable inferences in the plaintiffs' favor. *Deveraux v. City of Chicago,* 14 F.3d 328 (7th Cir.1994); *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir.1993). Having performed those tasks, we find ourselves in agreement with the district court.

We first note that the exact ground on which the plaintiffs and, for that matter, the Amici, who are attorneys general from several states, stand in this appeal is a little like shifting sand. The plaintiffs argue that the judgment of the Alabama court is null and void because the court did not have personal jurisdiction over them and that the special protections required for class actions—notice, adequate representation, etc.—were not complied with. However, they also say that they are not seeking to overturn the Alabama judgment. Then, they state that where the district court went wrong was to use a state court judgment which was "null and void" as the basis for the *Rooker-Feldman* bar. In addition, plaintiffs veer into

a claim that the January 30, 1996, Alabama court order cannot be a basis for the *Rooker-Feldman* bar because there was no personal jurisdiction over them, and furthermore that fraud claims are somehow outside the *Rooker-Feldman* bar. The Amici say that they do not want to establish an exception to the general rule that absent class members may be bound by a nationwide class action settlement, but that on the unusual—and egregious—facts of this case, the Kamilewicz action should be allowed to proceed.

The *Rooker-Feldman* doctrine grows out of two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). At its core, the doctrine is a recognition of the principle that the inferior federal courts generally do not have the power to exercise appellate review over state court decisions. In *Rooker,* the Supreme Court stated that because the jurisdiction of the federal district court was strictly original, those courts cannot reverse or modify a state court judgment-even if that judgment is wrong. Only the Supreme Court has that power. *Feldman* involved proceedings denying him a waiver of a bar admission rule which required that applicants have graduated from an approved law school. The first issue was whether the action constituted a judicial proceeding. The Court determined that

it was in fact such a proceeding and that a district court "has no authority to review final judgment of a state court in judicial proceedings." At 482, 103 S.Ct. at 1315.

It becomes necessary to our analysis, then, to determine whether what the federal court was asked to do in this case was, essentially, review a decision of a state court. Our cases offer means by which that determination is made. We ask whether the federal plaintiff seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim. *GASH Associates v. Village of Rosemont, Illinois,* 995 F.2d 726 (7th Cir.1993). Put another way, if the injury which the federal plaintiff alleges resulted from the state court judgment itself, then *Rooker-Feldman* controls, and the lower federal courts lack jurisdiction over the claim. It does not matter that the state court judgment might be erroneous or even unconstitutional. Nor does it matter that the time for appeal to the United States Supreme Court may have passed. *Garry v. Geils*, 82 F.3d 1362 (7th Cir.1996).

In addition, the state and federal cases also do not need to be directly on point. The Court found a lack of jurisdiction in *Feldman* itself when the federal constitutional claims were "inextricably intertwined," at 486, 103 S.Ct. at 1316-17, with the state court judgment. As we have explained, lower federal courts might be engaging in impermissible appellate review

even when asked to entertain a claim that was not argued in the state court but was "inextricably intertwined" with the state court judgment. *Ritter v. Ross,* 992 F.2d 750 (7th Cir.1993), *cert. denied,* 510 U.S. 1046, 114 S.Ct. 694, 126 L.Ed.2d 661 (1994).

Our cases have attempted to make the analysis of this issue easier by offering a sometimes helpful tip. That tip is that often, if a federal plaintiff was the plaintiff in the state court action, the doctrine he must contend with is res judicata, not *Rooker-Feldman.* On the other hand, if the federal plaintiff was the defendant in state court, *Rooker-Feldman* is the applicable doctrine. *Homola v. McNamara,* 59 F.3d 647 (7th Cir.1995); *Nesses v. Shepard,* 68 F.3d 1003 (7th Cir.1995). The tip, however, is merely that, and allows exceptions. As we pointed out in *Garry,* both the *Rooker* and *Feldman* plaintiffs were also plaintiffs in the state judicial proceedings. Although it may be that the federal plaintiff's position as either a plaintiff or a defendant in the state court proceeding will "usually coalesce with the source-of-the-injury standard," as we said in *Garry,* it may not always do so, and the important issue remains the source of the injury: the issue is whether the federal plaintiff is injured by the state court judgment or by a prior injury at the hands of the defendant.

How does all of this theory apply to the case before us? As a preliminary matter, we note that the Alabama court specifically found the settlement to be fair and approved the fees. In his order of January 24, 1994, the state judge found that the notice complied with all requirements of due process, that the consent decree was fair and reasonable, and that the attorney fees were reasonable.

Plaintiffs seem to be urging us to reach the conclusion that we can overturn the decision of the Alabama court insofar as it involved a determination that procedural due process was complied with. As support for this proposition, they rely on decisions which hold that a party can attack a *default* judgment against him if it is entered by a court without personal jurisdiction over him. We see significant differences between default judgments and the judgment under attack here. We reject the plaintiffs' far-reaching proposed exception to the *Rooker-Feldman* doctrine.

Another argument which seems slightly off-center is that the January 30, 1996, order, finding the allegations of fraud "baseless," is not subject to a *Rooker-Feldman* bar because it was entered in the absence of personal jurisdiction over the plaintiffs and it was entered after the federal lawsuit was filed. This argument is tied to the claim that plaintiffs were precluded from litigating their fraud claim in the state

court, and thus were required to—or had a right to—litigate it in federal court.

The January 30 order itself is not material to the issues before us. It is not necessary to rely on it to determine that the federal lawsuit was properly dismissed. The fact is that the proper court for an assertion of fraud in the procurement of a judgment is the one which rendered the judgment. As we stated in *Homola*, at 650:

> Relief in civil cases differs from that in criminal cases in two principal respects. First, the civil time limits are shorter (in federal litigation, for example, a claim of fraud on the court, *Homola*'s theme, must be made within one year, Fed.R.Civ.P. 60(b)(3)). Second, the losing party cannot move to a new forum but must present his argument to the court that rendered the judgment. See *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700 (7th Cir.1987). *Homola* has tried to shift not only courts but also jurisdictions, asking a federal judge to award relief for wrongs committed in state court. Instead of saying that there was no constitutional flaw in the state proceedings, the district court should have refused to entertain the claims, sending Homola back where he belongs—the original courts.

Alabama has a procedure by which a litigant can assert an independent action for fraud upon the court within three years of the entry of the fraudulently induced judgment. Alabama Rule of Civil Procedure 60(b). In addition, the Alabama court retained continuing jurisdiction over the class action. It is not for the federal court to decide these issues.

We are dismayed by the plaintiffs' reliance on *Derrickson v. City of Danville*, 845 F.2d 715 (7th Cir.1988), and *In re VMS Securities Litigation*, 156 F.R.D. 635 (N.D. Ill.1994), for any proposition regarding the *Rooker-Feldman* doctrine or the fraud allegations. In *Derrickson,* a *federal* class action settlement was approved. Then the state's attorney for Vermillion County, Illinois, opened a *criminal* investigation. The question before us was whether claim preclusion barred the criminal proceedings in state court, not, obviously, a *Rooker-Feldman* bar. Plaintiffs, in a footnote, acknowledge a problem using this case as authority for their argument as "it involved a state action following federal approval of a consent decree. . . ." We wholeheartedly agree. Similarly in *VMS,* the prior judgment was an approval of a settlement in a federal class action. The issues were whether certain subsequent state court actions could proceed. Use of either of these cases for the proposition that in the present suit,

the *Rooker-Feldman* doctrine does not present a bar is disingenuous, at best.

The Kamilewiczes were class member/plaintiffs in the Alabama suit. The part of the judgment they are unhappy with is the approval of the settlement as to the fees to be paid to their attorneys—fees which were assessed against them. The district court concluded that the *Kamilewicz* plaintiffs were in the position of defendants in this aspect of the state court proceedings. That conclusion has some support in logic and bolsters a finding of a *Rooker-Feldman* bar. More important, however, is the fact that the plaintiffs' injuries are a result of the state court judgment. Their claim in federal court is a multi-pronged attack on the approval of the settlement regarding the attorney fees issue. Regardless of which of the specific federal claims the district court were to consider, it would run directly into the state court finding, entered after a two-day fairness hearing—that the fees were reasonable. The federal claims are "inextricably intertwined" with the state court judgment, whether that judgment is right or wrong.

We won't deny that the Alabama judgment seems questionable on the surface. How can it be right that a plaintiff should recover less than $10 and have to pay nearly $100 in fees? But how can we—or the district court—know that we would have ruled another way? To determine that, we

would have to go through the steps already taken in the state court—precisely what lower federal courts are not allowed to do under *Rooker-Feldman.* And perhaps if we undertook that analysis we would find that some less tangible economic benefit to the class justified the settlement.

That the facts seem at least superficially egregious brings us to the arguments of Amici that on facts such as these an exception of some undefined sort should be carved out, and that if the plaintiff class was actually in the position of defendants on the attorney fees issue, then even under *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), perhaps personal jurisdiction was lacking in the Alabama court. We decline to take the step urged by the Amici.

In *Shutts*, the Court loosened somewhat the requirements for assertion of personal jurisdiction over members of a plaintiff class and determined that due process would be satisfied if there was notice, an opportunity to appear in person or by counsel, an opportunity to opt out of the class, and adequate representation. The rationale was, in part, that absent plaintiffs ordinarily do not face the same exposure as defendants. Amici argue that if on the attorney fees issue the *Kamilewicz* plaintiffs were actually in the position of defendants, then due process requires that issues of

personal jurisdiction be assessed under the traditional minimum contacts analysis of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Even were we to accept the argument, it does not change the fact that lower federal courts cannot review decisions of the state court. Here, the state court approved the settlement, including the fees. The Supreme Court of Alabama or the United States Supreme Court could reverse the decision were either so inclined. The federal district court, on the other hand, cannot review the Alabama decision. We also note the obvious—that the posture of the Alabama case is not unique. In class actions, often the fees are a percentage of the award granted to the plaintiff class. The argument of Amici, if accepted, could have ramifications far beyond this case.

Because we agree that *Rooker-Feldman* bars this action, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	
v.	:	No. 95 C 8341
BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,	:	**MEMORANDUM OPINION AND ORDER**
Defendants.	:	(Filed December 15, 1995)

PLUNKETT, District Judge.

This case is before the Court on the motion to dismiss of defendants Edelman & Combs and Daniel A. Edelman, in which all defendants except John or Jane Does 1 through 50 have joined. For the reasons set forth below, we grant the motion, and we dismiss this case for lack of subject matter jurisdiction.

BACKGROUND

The plaintiffs, Dexter J. Kamilewicz and Gretchen L. Kamilewicz, who reside in Maine, and Martha E. Preston, who resides in Wisconsin, have (or had) mortgages serviced by defendant BancBoston Mortgage Corporation ("BancBoston"). They were among the estimated 715,000 members of the plaintiff class in a nationwide class action challenging the manner in which BancBoston calculated the amount of escrow surplus each of its mortgage holders was required to maintain. The class action, *Hoffman, et al, v. BancBoston Mortgage Corp., et al.* (the "*Hoffman* litigation"), was filed in the Circuit Court of Mobile County, Alabama, in May 1991.

In the *Hoffman* litigation, the central issue was whether BancBoston overcharged mortgage holders whose mortgages it serviced so that a surplus existed in each mortgage holders'

escrow account. The ownership of the surplus was not in dispute in that case; the surplus belonged to the mortgage holders and was to be returned to them when their mortgages terminated. Rather, the complaint in the *Hoffman* litigation alleged that BancBoston's actual practice required deposits by the mortgage holders, through their monthly mortgage payments, that created and maintained substantial escrow surpluses, and that BancBoston's actual practice did not conform to the terms of the plaintiff class' mortgages relating to escrow surplus.

The remaining defendants in this case were either defendants in the *Hoffman* litigation or were attorneys representing one of the parties there. Bank of Boston Corporation ("Bank of Boston"), a defendant here, was also a defendant in the *Hoffman* litigation. It were [sic] represented in that case, along with BancBoston, by defendant Burr & Forman, an Alabama law firm, and defendant attorney T. Thomas Cottingham of that firm. The plaintiff class in the *Hoffman* litigation was represented by defendants Ezell & Sharbrough, an Alabama law firm, defendant attorneys Mark Ezell and John W. Sharbrough, III of that firm, defendant law firm Edelman & Combs of Chicago, and defendant attorney Daniel A. Edelman, defendant law firm Lawrence Walner & Associates of Chicago, and defendant attorney Lawrence

Walner (collectively, the "*Hoffman* class counsel defendants").

In October 1993, the Alabama court granted partial summary judgment in favor of the plaintiff class on the grounds that BancBoston's practice was inconsistent with the terms of the mortgages. Pursuant to an order entered by the Alabama court on October 12, 1995, the *Hoffman* class counsel defendants prepared a notice of proposed settlement to be sent to the plaintiff class, in which they represented that the settlement was "fair, reasonable, adequate, and in the best interests of the class," and that the attorneys' fees they sought were "reasonable." (Compl., ¶ 67.) Bank of Boston and BancBoston filed objections to the proposed notice shortly thereafter, asserting that it wad [sic] misleading to the plaintiff class because it failed to inform them that there [sic] "substantial adverse effects" to the proposed settlement, including, among other things, that if the Alabama court ordered BancBoston to refund the escrow surplus, and if the *Hoffman* class counsel defendants sought attorneys' fees out of that refund, then the plaintiff class would suffer an actual out-of-pocket loss as a result of the lawsuit.[1] (Compl., ¶ 70.)

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[1] According to the complaint, the objections to the proposed notice were apparently withdrawn as moot. (Compl., ¶ 69.)

The plaintiffs here allege that before the Alabama court granted partial summary judgment, Bank of Boston and BancBoston had offered to settle the *Hoffman* litigation in a manner which would have required them to pay $500,000 to the *Hoffman* class counsel defendants as attorneys' fees, so that the entire escrow refund would have been returned to the plaintiff class. The *Hoffman* class counsel defendants allegedly refused that settlement, insisting both that the amount of the attorneys' fees they recovered should be significantly higher, and that the fees should be taken from the individual escrow accounts of the plaintiff class, not from the escrow refund.

The *Hoffman* litigation settled in principle in November 1993. The terms of the settlement, later memorialized in a consent decree, were, in pertinent part:

(1) BancBoston agreed to change its method of escrow account analysis, which reduced the amount of escrow funds it could hold by approximately 19%;

(2) the plaintiff class members would receive one-time interest payments ranging from $0.00 to $8.76; and

(3) the plaintiff class members would receive a refund of the excess escrow funds, from which the attorneys'

fees for the class *Hoffman* counsel defendants would be deducted.

The plaintiffs here allege that the true economic benefit to the plaintiff class in the *Hoffman* litigation was only the interest payment; that is, the value of receiving the escrow surplus now rather than receiving it when the mortgage terminated. However, they allege that the *Hoffman* class counsel defendants misled the Alabama court by convincing it that the economic benefit to the plaintiff class was the entire escrow surplus, which they allegedly did in order to increase the award of attorneys' fees. The *Hoffman* class counsel defendants were allegedly awarded fees as a percentage of that surplus, despite the fact that this money had always belonged to the plaintiff class; specifically, they allegedly received as fees 28% of the total escrow surplus, or an amount in excess of $14,000,000.[2]

The plaintiffs allege that all the defendants here deliberately omitted from the consent decree (submitted to the

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[2] At oral argument held on December 5, 1995, counsel for defendants Edelman & Combs and Daniel A. Edelman asserted that the actual fee award was closer to $8,000,000. However, this dispute of fact is not relevant to our subject matter jurisdiction, and therefore, on this motion to dismiss, we take the allegations in the complaint as true. *See infra* at 9.

Alabama court) and from the notice of hearing on proposed settlement of class action (sent to the plaintiff class) any mention of the fact that the settlement would result in an out-of-pocket loss to most members of the plaintiff class, and that the attorneys' fees awarded to the *Hoffman* class counsel defendants exceeded 28% of the true economic benefit to the plaintiff class. The plaintiffs also allege that the notice of hearing on proposed settlement of class action filed with the Alabama court by the *Hoffman* class counsel defendants, which was twelve single-spaced pages, contained the following material misrepresentations:

(1) that the settlement was fair, reasonable. adequate, and in the best interests of the class, when it was not;

(2) that by participating in the class, members of the class would receive monetary distributions, when in fact most class members would suffer an out-of-pocket loss; and

(3) that the *Hoffman* class counsel defendants would request attorneys' fees which would not exceed one-third of the "economic benefit" to the plaintiff class, without disclosing that the "economic benefit" referred to was the entire escrow surplus, which already belonged to the plaintiffs.

The plaintiffs further allege that the defendants knew that if they clearly informed the plaintiff class of the ramifications of the proposed settlement in the *Hoffman* litigation, most of the plaintiff class would opt out of the class.

The proposed notice was approved by the Alabama court on December 6, 1993, and it was sent to approximately 415,000 class members at their last known addresses on December 9 and 10, 1993. In addition, a copy of the notice was published in *USA Today* on December 13 and 20, 1993. Only 1,500 members of the plaintiff class opted out, and it is alleged that many may have done so by mistake because they did not understand the notice.

On January 10 and 11, 1994, the Alabama court held a fairness hearing regarding the proposed settlement. The defendants testified and presented expert testimony that the economic benefit to the class was at least equivalent to the amount of the escrow surplus to be refunded to the members of the plaintiff class, not the value of receiving that escrow surplus now rather than later. The plaintiffs allege that the Alabama court was never informed that the settlement would result in an out-of-pocket loss to almost all members of the plaintiff class. The Alabama court approved the settlement,

finding the attorneys' fees reasonable in light of fees awarded in other cases, on January 24, 1994.

Pursuant to the settlement of the *Hoffman* litigation, from about May 1994 through the end of that year, BancBoston deducted attorneys' fees from the plaintiff class members' escrow accounts in the amount of 5.32% of the account balance. In January 1995, BancBoston sent 1994 Annual Tax and Interest Statements to each of its mortgage holders, on which the deduction for attorneys' fees was listed only as a "miscellaneous disbursement." (Compl., ¶ 105(d).) The plaintiffs allege that this misleading label was applied as a further effort to deceive the members of the plaintiff class regarding the amount of attorneys' fees, and the manner of their payment, awarded to the *Hoffman* class counsel defendants.

The plaintiffs filed this action on November 2, 1995. They have asserted a claim under section 1962(c) of RICO, 18 U.S.C. § 1962(c), against all defendants (Count I); a claim under section 1962(d) of RICO against all defendants (Count II); a civil rights claim under section 1983, 42 U.S.C. § 1983, against the *Hoffman* class counsel defendants (Count III); a common law fraud claim against all defendants (Count IV) ; a common law fraudulent concealment claim against all defendants (Count V); a negligent misrepresentation claim

against all defendants (Count VI); a claim of attorney malpractice against the *Hoffman* class counsel defendants (Count VII); a claim of breach of fiduciary duty against the *Hoffman* class counsel defendants (Count VIII); a claim of conversion against Bank of Boston and BancBoston (Count IX); and a claim of breach of fiduciary duty against Bank of Boston and BancBoston (Count X). They seek treble damages on the RICO claims, and either compensatory damages alone, or both compensatory and punitive damages, on the remaining claims. The plaintiffs have filed this as a class action. We have both federal question and diversity jurisdiction.

After this motion to dismiss was filed, but before it had been fully briefed and decided, defendant John W. Sharbrough III filed, on behalf of the *Hoffman* class counsel defendants, a motion in the *Hoffman* litigation requesting that the Alabama court order the plaintiffs in this case to show cause why they should not be bound by the settlement agreement in that case (the "*Hoffman* motion"). That motion also requested, although without discussion, that sanctions be imposed on the plaintiffs in this case, presumably for filing this action. Subsequently, the plaintiffs here filed an emergency motion for a temporary restraining order, asking this Court to enjoin the *Hoffman* class counsel defendants from pursuing the *Hoffman* motion. Defendants Edelman & Combs and Daniel A. Edelman filed a written response to the emergency motion.

We were informed at the December 5, 1995 hearing on the plaintiffs' emergency motion that the day before, the Alabama court had granted the *Hoffman* motion on an *ex parte* basis and had ordered the plaintiffs in this case to appear in Alabama on December 18, 1995, at which time they would be given an opportunity to present evidence and testimony in support of their allegations challenging the Alabama court's final order in the *Hoffman* litigation. We ordered the parties in this case to complete the briefing on the motion to dismiss because we could not reach the issues raised in the plaintiffs' emergency motion for a temporary restraining order until we determined that we had subject matter jurisdiction over this case.

DISCUSSION

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12 (b) (1) of the Federal Rules of Civil Procedure, we must take all well-pleaded allegations in the complaint as true and draw all reasonable inferences therefrom in favor of the plaintiff. *Rueth v. United States Envtl. Protection Agency,* 13 F.3d 227, 229 (7th Cir. 1994).

The moving defendants have raised a number of issues in their motion to dismiss. They assert that this Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine, that the plaintiffs' claims are barred by res judicata

and collateral estoppel, that the plaintiffs have failed to state RICO claims because they have not adequately alleged either an enterprise or a pattern, that they have failed to state a section 1983 claim because none of the defendants were state actors, and that all of the common law claims fail because they are based on statements made in the course of adverse legal proceedings.

We consider first the issue of whether, under the *Rooker-Feldman* doctrine, we lack subject matter jurisdiction over the plaintiffs' claims, for, if that is true, we must dismiss this case without taking action on the pending motions. The *Rooker-Feldman* doctrine, set out in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), "teaches that the Supreme Court of the United States is the only federal court that has jurisdiction to review the decision of a state court..." *Hoover v. Wagner,* 47 F.3d 845, 849 (7th Cir. 1995). Its boundaries, and the line separating it from res judicata, are less than precise. On two of its most recent decisions addressing the issue, the Seventh Circuit has clarified that the distinction between *Rooker-Feldman* and res judicata lies in the role occupied by the federal plaintiff in state court proceedings, explaining:

> [The *Rooker-Feldman* doctrine] ought to be confined to cases in which the *defendant* in the state court is seeking to undo a remedial order of some sort (ordinarily a criminal conviction or an injunction). That is unmistakably a collateral attack on the state court's judgment. When a *plaintiff* seeks to relitigate a suit that has been decided against him, he is not so much attacking as trying to bypass the judgment in that suit; and the doctrine that blocks him is res judicata.

Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995) (emphasis added). Putting it another way,

> A plaintiff who loses and tries again encounters the law of preclusion. The second complaint shows that the plaintiff wants to ignore rather than upset the judgment of the state tribunal. A *defendant* who has lost in state court and sues in federal court does not assert injury at the hands of his adversary; he asserts injury at the hands of the court, and the second suit therefore is an effort to obtain collateral review. It must be dismissed not on the basis of preclusion but for lack of

> jurisdiction. This is the effect of the *Rooker-Feldman* doctrine . . . .

Homola v. McNamara, 59 F.3d 647, 650 (7th Cir. 1995) (emphasis in original). The analysis does not stop there, however. Where a federal plaintiff raises an independent claim, "albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party," then *Rooker-Feldman* does not bar the federal action. *GASH Assoc. v. Village of Rosemont,* 995 F.2d 726, 728 (7th Cir. 1995).

Thus, whether the *Rooker-Feldman* doctrine requires us to dismiss this case turns on the role which the plaintiffs here occupied in the *Hoffman* litigation. If we conclude that the plaintiffs here were in the role of plaintiffs on the issue of attorneys' fees in the *Hoffman* litigation, *Rooker-Feldman* clearly has no application. In that case, we have subject matter jurisdiction to consider both the remaining issues raised in the motion to dismiss and the issues raised in the plaintiffs' emergency motion for a temporary restraining order.

While, in many circumstances, the question of the role a litigant occupied in prior litigation may be easily answered, in this case it is complicated by the inherently adversarial nature of the relationship between a plaintiff class and class

counsel in a class action on the issue of attorneys' fees. The *Hoffman* class counsel defendants were in an adversarial position to their clients at the fairness hearing in the *Hoffman* litigation regarding their fees. (Defs.' Br. at 7.) Thus, the fact that the plaintiffs here were members of the plaintiff class is not dispositive of the *Rooker-Feldman* issue; they were also in an adversarial position to their attorneys over the attorneys' fees. And, we think, their position was a defensive one. On the fee issue, the *Hoffman* class counsel defendants were in the role of plaintiffs, for they were asking the Alabama court for certain affirmative relief, namely, an award of fees calculated in a particular manner. The plaintiffs here, in contrast, were cast in the role of defendants, for they had no obligation to put forth any evidence on the issue, but were entitled to present objections and cross-examine the witnesses presented by the *Hoffman* class counsel defendants. Moreover, the final judgment regarding attorneys' fees obligated them to pay money to the *Hoffman* class counsel defendants. Thus, because we have concluded that these plaintiffs were in the role of defendants vis-a-vis the *Hoffman* class counsel defendants on the issue of attorneys' fees, the *Rooker-Feldman* doctrine could bar this action.

We must next determine whether the plaintiffs here seek to collaterally attack the judgment of the Alabama court in the *Hoffman* litigation or whether they have asserted an

independent claim. It is alleged that the Alabama court decided both the issues of the economic benefit to the plaintiff class and the reasonableness of the attorneys' fees awarded to the *Hoffman* class counsel defendants. The gist of the plaintiffs' claims here is that the Alabama court reached the wrong decision as a result of the fraud perpetrated upon it and the plaintiff class by these defendants.

Even though their request for relief is dressed up as damages under RICO, section 1983, or for attorney malpractice, the plaintiffs are asking us to undo what the Alabama court did, and that constitutes a [sic] impermissible collateral attack upon the state court judgment. The *Rooker-Feldman* doctrine bars federal suits where, although the claims were not argued in the state court proceedings, they are "inextricably intertwined" with the state court judgment. *Wright v. Tackett,* 39 F.3d 155, 157 (7th Cir. 1994). If we were to address the merits of the plaintiffs claims, we would have to re-examine documents filed with and approved by the Alabama court, such as the notice of proposed settlement, and we would have to re-open, in effect, the Alabama court's decision regarding the economic benefit to the class and the reasonableness of the award of attorneys' fees. The *Rooker-Feldman* doctrine prohibits us from doing any of this, and, hence, we lack subject matter jurisdiction over the plaintiffs' claims.

The plaintiffs argue that fraud is an exception to *Rooker-Feldman,* and that the fraud in the *Hoffman* litigation "so permeated" that case that it "disabled the state court judge from rendering a fair or independent judgment." (Pls.' Br. at 7.) They suggest, by this, that the state court was biased against them as a result of the fraud, and that fairness requires that they now be given a federal forum for their claims (presumably because the Alabama court would not be fair to them now).[3] This makes little sense. If the defendants did perpetrate a fraud upon the Alabama court, as the plaintiffs have alleged, then the state court was an innocent victim of it; that is a far cry from being prejudiced against the plaintiffs. Moreover, if the plaintiffs address their concerns to the Alabama court now and can substantiate their claims, that court is likely to be outraged by the defendants' conduct.

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[3] In support of their emergency motion for a temporary restraining order, the plaintiffs cast the Alabama court's December 4, 1995, order granting the *Hoffman* motion in part and scheduling a hearing on the plaintiffs' claim of fraud for December 18, 1995, in a sinister light, an indication that the Alabama court will do them harm. We do not think this interpretation is a fair reading of the December 4 order. There is nothing improper about the Alabama court holding a hearing on the plaintiffs' allegations of fraud. The plaintiffs here have made no allegation that the Alabama judge participated in the fraud, and so we have considerable trouble understanding why they should not receive fair treatment in that court.

Our conclusion that, under the *Rooker-Feldman* doctrine, we lack subject matter jurisdiction over this case does not leave the plaintiffs without a remedy.[4] The Alabama court has already scheduled a hearing for December 18, 1995, to allow the plaintiffs to present evidence that the defendants in this case perpetrated a fraud upon that court in connection with the award of attorneys' fees. One of two things will likely happen there. The Alabama court may make it clear to these plaintiffs that it was aware that the plaintiff class would suffer an out-of-pocket loss as a result of the attorneys' fees awarded, but that the court considered that result reasonable in light of the benefits to the class or for other reasons; in that instance, the plaintiffs simply have no claims, regardless of how aggrieved they may feel. On the other hand, the court may make it clear to these defendants that it was not aware of this fact; in that instance, the court will, most likely, inquire further into their conduct. And, in the event that the matter is not resolved in this fashion, counsel for the plaintiffs in this case represented to this Court at the oral argument on the plaintiffs' emergency motion that Alabama law allows an independent suit alleging fraud upon the court in an earlier

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[4] Even if it did, of course, our conclusion here would have to be the same.

action to be brought within three years of the entry of the fraudulently procured judgment. The final judgment in the *Hoffman* litigation was entered on January 24, 1994, and so, presumably, these plaintiffs here could bring such an action.

CONCLUSION

For the forgoing [sic] reasons, we grant the motion to dismiss of defendants Edelman & Combs and Daniel A. Edelman, joined by all defendants except John or Jane Does 1 through 50, and we dismiss this case for lack of subject matter jurisdiction. All other pending motions, including the plaintiffs' emergency motion for a temporary restraining order and the motion of Bank of Boston and BancBoston Mortgage Corporation to dismiss for improper venue, are denied as moot. This order is final and appealable.

ENTER:

/s/ Paul E. Plunkett
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-1019

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Defendants-Appellees.

On Petition For Rehearing With
Suggestion For Rehearing En Banc

November 22, 1996

ORDER

A panel decided this case on August 8, 1996. On August 22, 1996, the plaintiffs-appellants filed a petition for rehearing and suggestion for rehearing en banc. Subsequently, the judges on the panel voted to deny the petition for rehearing, and a vote was requested on the suggestion for rehearing en banc. A majority of the active members of the court have voted to deny rehearing en banc. Chief Judge POSNER and Circuit Judges EASTERBROOK, MANION, ROVNER, and DIANE P. WOOD voted to grant rehearing en banc.

IT IS THEREFORE ORDERED that the petition for rehearing is hereby DENIED. Because a majority of judges voted to deny rehearing en banc, the suggestion to do so is also DENIED.

EASTERBROOK, Circuit Judge, with whom POSNER, Chief Judge, and MANION, ROVNER, and DIANE P. WOOD, Circuit Judges, join, dissenting from the denial of rehearing en banc.

A class action contending that the Bank of Boston and its affiliates (collectively, the Bank) did not promptly post interest to real estate escrow accounts was filed in Alabama by a Chicago law firm. *Hoffman v. BancBoston Mortgage Corp.*, No. CV-91-1880 (Mobile Cty. Cir. Ct.). Settlement ensued, and the class members learned only what the notice told them. Few opted out or objected, because the maximum award to any class member was less than $9. Any recovery, however

small, seemed preferable to initiating a separate suit or even bearing the costs of protesting the settlement's terms. After the state judge approved the pact, the Bank carried out its part: it disbursed more than $8 million to the class attorneys in legal fees and credited most accounts with paltry sums. Problem: the fees, equal to 5.32 percent of the balance in each account, were debited to the accounts. For many accounts the debit exceeded the credit. Dexter J. Kamilewicz, for example, received a credit of $2.19 and a debit of $91.33, for a loss of $89.14.

Outraged account holders hired new lawyers to sue their "champions" from the state case for malpractice, breach of fiduciary duty, indeed for fraud. Defendants insist that most members of the class emerged with net benefits, but they do not deny that many suffered net losses—and that these impending losses, known to those who negotiated the settlement, were not disclosed to the class members. Kamilewicz believes that even when the credit exceeded the debit the account holder lost, because the credit would have been made when the mortgage terminated and the escrowed sum was released; the real economic benefit was not the amount of the credit but the interest that could be earned from investing the payment sooner.

Kamilewicz and the other representative plaintiffs sued not only the lawyers for the plaintiff class in *Hoffman* but also the Bank and the Bank's lawyers. Everything the Bank did to affect Kamilewicz's interests was authorized by the judgment

based on the settlement, so the Bank's inclusion in the case marked an effort to obtain collateral review of the state court's judgment. Kamilewicz argued that the judgment is void with respect to account holders who live outside Alabama—for what right does Alabama have to instruct financial institutions in Florida to debit the accounts of citizens of Maine and other states? (Despite its name, BancBoston's headquarters are in Florida, and the Kamilewiczes hail from Maine.) Class members are not bound when a state court exceeds its jurisdiction. The Attorneys General of Florida, Maine, and seven other states have filed a brief as amicus curiae to protest their citizens' treatment by Alabama. According to Kamilewicz, the Alabama judgment is doubly flawed, because the notice was so misleading that it denied the class members due process of law. A deficient notice means that the class members' right to opt out was defeated, which has jurisdictional consequences of its own. Lack of jurisdiction and unconstitutional procedures are recognized grounds for disregarding a judgment in a class action. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Richards v. Jefferson County*, ____ U.S. ____, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). But by asking for collateral review of a judgment, the Kamilewicz class invited the response: "In federal court?" Under the *Rooker-Feldman* doctrine, named after *Rooker v. Fidelity Trust Co.* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), the Supreme Court of the United States is the only federal court authorized to review a

state court's judgment in civil litigation. Defendants invoked this rule and argued that the Kamilewicz class could obtain relief only from a state court. The district court agreed and dismissed the entire complaint for want of jurisdiction, and a panel of this court affirmed. 92 F.3d 506 (1996).

Suppose A sues B in a state that lacks any connection to B or to the dispute. B refuses to appear and the court enters a default judgment, which A attempts to collect using the processes of the federal court under the diversity jurisdiction. Would the court really direct B to pay, without inquiring into the jurisdiction of the state court? Certainly not in the fifth circuit, which has held that the *Rooker-Feldman* doctrine permits the kinds of collateral attacks that any state court of general jurisdiction could entertain. *Davis v. Bayless,* 70 F.3d 367, 375-76 (5th Cir. 1995). ("Any" is an important qualifier, for reasons discussed in *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995), and *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700 (7th Cir. 1987).) When *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), held that a judgment rendered without personal jurisdiction over members of the class is not entitled to full faith and credit, the Justices did not add: "except in federal court." Granted, the defendants in today's case are not trying to execute a judgment; they want to fend off a challenge to the status quo. But the difference between offensive and defensive use of a judgment is not important to the panel's conclusion, or to mine—which is that a judgment that is not entitled to full faith

and credit does not acquire extra force via the *Rooker-Feldman* doctrine.

Collateral attacks based on lack of personal or subject-matter jurisdiction are proper, no less in class actions than in other cases—indeed, they are especially appropriate where class members are stunned to find that, although aligned as plaintiffs, they are net losers, just as if the original defendants had filed and prevailed on a counterclaim of which they received no notice and over which the state court had no jurisdiction. In effect, though not in name, this was a defendant class, attempting (unbeknownst to its members) to fend off predatory lawyers' claims to the balances in the escrow accounts. The substantial jurisdictional problems entailed by defendant classes, *see Phillips Petroleum,* 472 U.S. at 808, 811 & n. 3, 105 S.Ct. at 2972-73, 2974 & n. 3; Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions,* 62 Ind. L.J. 597, 607-12 (1987), were aggravated by the class members' ignorance of their exposure.

In *Matsushita Electric Industrial Co. v. Epstein,* ____ U.S. ____, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996), members of a class in a securities case filed in state court initiated an independent action in federal court for the purpose of attacking the terms on which the state case had been settled. They argued that the state court lacked jurisdiction to resolve claims based on federal securities law. Ultimately they lost - but not on *Rooker-Feldman* grounds. The Supreme Court concluded that state judges may accept and enforce

settlements of federal claims. This it held on the merits. It did not mention the possibility that the federal court lacked jurisdiction, which I think signifies how obvious it was to all concerned that the *Rooker-Feldman* doctrine is inapplicable. If it was inapplicable in *Matsushita*, it is inapplicable here too. I grant that *Matsushita* did not "hold" this, because it did not discuss jurisdiction. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 & n. 29, 104 S.Ct. 900, 918 & n. 29, 79 L.Ed.2d 67 (1984); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 & n. 9, 73 S.Ct. 67, 69 & n. 9, 97 L.Ed. 54 (1952). Shared assumptions are revealing nonetheless. And in today's case as in *Matsushita* the aggrieved class members may choose a new forum; they need not return to a court whose lack of jurisdiction is the basis of their position. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760, 767-69 (3d Cir. 1989). None of this is to say that the Alabama court actually lacked jurisdiction, or that the notice was inadequate; to get anywhere against the Bank the Kamilewicz class must establish these things; but under the panel's approach the state court's judgment blocks federal litigation even if it lacked jurisdiction.

Next consider plaintiffs' claim against the *Hoffman* class counsel, which is not a collateral attack on a judgment. It takes the judgment as a given—indeed, it is only so long as the judgment stands that the litigant has a compensable loss. Neither state nor federal law requires a malpractice suit to be filed in the same court that handled the initial litigation. The

Rooker-Feldman doctrine therefore does not apply to malpractice suits, which may be litigated in federal courts without regard to the location of the initial case. If the panel is right, no malpractice suit growing out of state litigation in which the judge awarded attorneys' fees—maybe no malpractice suit, period—may be brought in federal court, even if all requirements of the diversity jurisdiction have been satisfied. This holding is sufficiently troubling and affects so many other cases that it is worth the time of our court to consider the subject en banc.

The *Rooker-Feldman* doctrine has two rationales: first, that the decision of a state court reached after notice and opportunity for hearing is not an independent violation of the Constitution, and therefore is not actionable under 42 U.S.C. § 1983; second, that by virtue of 28 U.S.C. § 1257 only the Supreme Court may review the decision of a state court in civil litigation. See *ASARCO Inc. v. Kadish,* 490 U.S. 605, 622-23, 109 S.Ct. 2037, 2048-49, 104 L.Ed.2d 696 (1989); *GASH Associates v. Rosemont*, 995 F.2d 726 (7th Cir. 1993). The rationales of the doctrine identify important limits: the first theme is irrelevant to a malpractice suit, and the second is beside the point, because the plaintiff does not seek review of the decision. The original parties' entitlements *vis-a-vis* each other are fixed by the judgment. The contest now is between the litigant and his lawyer. We have emphasized this distinction many times - not only in malpractice cases, but also when the loser tries to get relief from judgment because of the

lawyer's incompetence. E.g., *United States v. 7108 West Grand Avenue*, 15 F.3d 632 (7th Cir. 1994).

Consider a related sequence of litigation. A sells a painting to B, and before delivering the painting to B sells it again to C. Then A learns that the painting has increased in value and holds onto it. B sues A in state court for specific performance and prevails. Next C sues A for damages. Surely the *Rooker-Feldman* doctrine does not foreclose C from using federal court. C's suit does not attack the judgment (B keeps the painting); C wasn't even a party to B v. A; and the cause of C's loss wasn't the judgment, but A's double dealing. So too with malpractice litigation: it is a suit against a nonparty (the lawyer) alleging harm from incompetent or deceitful acts. That the lawyer's misconduct occurred in a judicial proceeding doesn't insulate the lawyer from liability, even when the *Rooker-Feldman* doctrine insulates the *judgment*.

The Supreme Court's most recent discussion of the *Rooker-Feldman* doctrine strongly implies that it does not bar malpractice litigation. *Johnson v. DeGrandy*, 512 U.S. 997, ____, 114 S.Ct. 2647, 2654, 129 L.Ed. 2d 775 (1994), holds that the *Rooker-Feldman* doctrine does not bar voting rights litigation filed by the United States, even though the districts being challenged were approved by a state court in adversarial litigation. The Court observed that the United States was not a party to the state case and therefore could not have presented its claim by petition for certiorari under § 1257; the inability

to do so meant that it could litigate independently. We, too, have held that the *Rooker-Feldman* doctrine does not affect suits by or against persons who were not parties to the initial case. *Leaf v. Supreme Court of Wisconsin,* 979 F.2d 589, 598 (7th Cir.1992); *Downs v. Westphal*, 87 F.3d 202, 203 (7th Cir.1996) (Rovner, J., concurring). Cf. *Lynk v. LaPorte Superior Court No. 2,* 789 F.2d 554 (7th Cir.1986). It may apply when the non-parties occupy positions functionally identical to the parties (for example, when a person whose property has been condemned by a city retaliates with a suit against the mayor), but the class attorneys are not the Bank's alter egos. The attorneys representing the Hoffman class were not parties to the Alabama case. Neither were the class members. Absent class members are represented by the named plaintiffs and their lawyers, but they aren't parties, a point reflected in federal litigation by disregarding their citizenship. They are ignored in negotiating settlements as well. A real party's lack of assent means that there is no settlement; but the missing class members don't sign the settlement, and their objection is not dispositive. It is crammed down the throats of objectors, which cannot be done to real parties. What is more, the members of the Kamilewicz class could not have presented their malpractice arguments to the Supreme Court by petition for certiorari under § 1257: they did not discover the malpractice until later (it was not reflected in the record of the state proceeding); it was not litigated in the Hoffman case; class members can't seek appellate review without intervening, *In re VMS Limited Partnership*, 976 F.2d 362 (7th Cir.1992); *Research Corp. v.*

Asgrow Seed Co., 425 F.2d 1059 (7th Cir.1970), which further illustrates their non-party status; and of course malpractice is not a federal claim, so it is outside the scope of § 1257. For some purposes missing class members are treated *like* parties, but only if the named plaintiffs adequately represent the interests of the class, and only if the unnamed members of the class receive adequate notice and elect not to opt out, *Phillips Petroleum*, 472 U.S. at 808-13, 105 S.Ct. at 2972-75—which in this case is the very thing in dispute! It gets the cart before the horse to reject, as barred by a judgment, an effort by the absent class members to show that they were not properly brought into the state case and therefore are not affected by the judgment.

From all of this it follows that a malpractice action is not affected by the *Rooker-Feldman* doctrine. Does the fairness hearing required to approve the settlement of a class action make a difference? I think not. For the reasons just explained, absent class members (*especially* those who deny the state court's jurisdiction over them) are not parties and cannot be treated as bound by the findings implicit in the approval of the settlement and the award of fees to attorneys. The panel implied approval of the district court's conclusion that the class members were effectively defendants resisting financial demands by the attorneys, 92 F.3d at 511, which makes the jurisdictional shortcoming clear and establishes that the judgment is not entitled to full faith and credit.

All jurisdictional doubts to one side, a settlement followed by a fairness hearing remains more like a contract than like litigation. Accordingly there is even less reason to apply the *Rooker-Feldman* doctrine than in a normal malpractice case, where the loss ensues from a genuine contest. Representative plaintiffs and their lawyers may be imperfect agents of the other class members—may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information. This possibility, a staple of the literature about class actions, e.g., John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L.Rev. 1343 (1995); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L.Rev. 1 (1991) enjoys judicial recognition. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 630-31 (3d Cir.1996), cert. granted under the name *Amchem Products, Inc. v. Windsor*, ____ U.S. ____, 117 S.Ct. 379, ____ L.Ed.2d____ (1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.1995). Recall that even the active opposition of class members does not automatically block the settlement, which therefore rests on the *lawyers*' consent, not the litigants' agreement or the legal decision of a court.

The Kamilewicz class asserts that it suffered harm from the *Hoffman* class lawyers' breach of their duties of care and loyalty in negotiating the settlement, which was concealed from the Alabama judge (and the class) by a further breach of the duty of loyalty in drafting the notice about the settlement. The notice not only didn't alert the absent class members to the impending loss but also pulled the wool over the state judge's eyes. Suing faithless agents is far from the core of the *Rooker-Feldman* doctrine, which should not be extended to block suits like this. "Were [plaintiff] merely claiming that the decision of the state court was incorrect, even that it denied him some constitutional right, the doctrine would indeed bar his claim. But if he claims, as he does, that people involved in the decision violated some independent right of his . . . then he can, without being blocked by the *Rooker-Feldman* doctrine, sue to vindicate that right." *Nesses v. Shepard*, 68 F.3d 1003, 1004 (7th Cir.1995).

The panel's decision is important. If I am right that the state court's award of attorneys' fees does not matter, then the decision logically bars all malpractice and related fiduciary-duty suits arising out of state litigation. We have entertained many, without seeing jurisdictional problems. And even if I am wrong about the sweep of the panel's decision, the issue is recurrent. Two recent decisions of other circuits—*Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir.1996), and *Diaz v. Sheppard*, 85 F.3d 1502 (11th Cir.1996)—hold that a class may prosecute a malpractice action against its attorneys even after a settlement has been approved in a fairness hearing.

Although the initial suits in both *Durkin* and *Diaz* were in federal court, making the *Rooker-Feldman* doctrine inapplicable on our panel's holding, the approach of *Durkin* and *Diaz* is incompatible with the panel's. If the *Rooker-Feldman* doctrine applies to suits by the absent class members because a malpractice action is a collateral attack on the order approving the settlement and awarding attorneys' fees, then the law of preclusion (res judicata) should bar malpractice actions in any court, state or federal, and without regard to which judicial system handled the first case. Yet no one thinks that. A malpractice suit is an independent action. A (potential) defense of issue preclusion is defeated by the very theory of the claim: that the first judgment is unreliable because of the attorney's bungling. The bungler cannot point to the adverse judgment produced by his own incompetence to ward off the client's demand. The Kamilewicz class may fail in its proof, or it may encounter other obstacles, but the *Rooker-Feldman* doctrine does not close the door of the federal courthouse.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,	
Plaintiffs,	Civil Action No. 95C 6341
v.	Class Action
BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,	COMPLAINT JURY TRIAL DEMANDED (Filed November 2, 1995)
Defendants.	

Based upon personal knowledge as to themselves and their own acts, and upon information and belief as to all other matters, plaintiffs allege as follows:

JURISDICTION AND VENUE

1. This action arises and is brought under Sections 1962(c) and 1962(d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); 18 U.S.C. §§ 1962(c) and 1962(d); Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983; and under the common law.

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1343 and 18 U.S.C. § 1964. The state law claims form part of the same case or controversy under Article III of the United States Constitution as the claims that arise under federal law. Therefore, this Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

3. This Court also has jurisdiction over the subject matter of this action under 28 U.S.C. § 1332 because this is a civil action in which the matter in controversy, excluding interest, exceeds $50,000 and complete diversity exists among the parties to this action.

4. The acts and occurrences giving rise to the claims alleged in this action took place, in part, within the Northern District of Illinois. Venue is proper in this district under Section 1965 of RICO, 18 U.S.C. § 1965, and 28 U.S.C. § 1391(b) because each of the defendants resides, has agents, transacts or has transacted his or its affairs within the district, and the defendants, through their illegal activity, have had substantial contacts within the district. Further, based on the

allegations set forth in this Complaint, the ends of justice require that this action be heard before the District Court for the Northern District of Illinois.

SUMMARY OF ALLEGATIONS

5. Plaintiffs' claims in this litigation are that Bank of Boston Corporation ("Bank of Boston"), BancBoston Mortgage Corporation ("BancBoston"), the banks' lawyers in a nationwide class action, and the lawyers representing the plaintiff class in the nationwide class action agreed and conspired to mislead and deceive the class members so that the class members' lawyers would recover enormously excessive fees. The result was that the plaintiffs, homeowners whose mortgages were being serviced by BancBoston, paid massive attorneys' fees -- fees that far exceeded both the benefit of the litigation to the class members and the lawyers' representations of what the class members would pay.

6. Plaintiffs in *Hoffman, et al. v. BancBoston Mortgage Corp., et al.*, Civil Action No. CV-91-1880 (Circuit Ct., Mobile Cty., Ala. 1991) (Braxton L. Kittrell, Jr., J.) (the "*Hoffman* Action"), were a nationwide class of approximately 715,000 individuals who previously or currently had mortgages with BancBoston. The class action challenged BancBoston's practice -- a practice that became prohibited by United States Department of Housing and Urban Development regulations soon after the settlement of the case -- under which BancBoston overcharged mortgage holders whose mortgages

it serviced in order to create a small "cushion" or "surplus" in each mortgage holder's escrow account.

7. The surplus money always belonged to the mortgage holder and indisputably would have been returned to the mortgage holder at the termination of the mortgage -- the only issue in the *Hoffman* Action was the propriety of BancBoston holding that surplus until the time that it would be returned to the mortgage holder. Although the average surplus was minimal, the sum of all the escrow surplus totaled in excess of $41 million at the time the *Hoffman* Action was settled.

8. The Hoffman Action was settled by an agreement that BancBoston would stop overcharging to create excessive escrow surpluses; would pay a small amount of interest (ranging from $0.00 to $8.76) to each class member based on past overcharges; and would refund any excess surplus in each escrow account to the mortgage holder. In turn, the attorneys would receive as fees twenty-eight percent of BancBoston's entire excess surplus, deducted from each account as a "miscellaneous disbursement." The result of the *Hoffman* Action was that most, if not all, class members *lost* money and their attorneys received fees in excess of $14 million.

9. The fraudulent scheme, in which the class members' attorneys, the banks and the banks' attorneys knowingly acquiesced and participated, involved

characterizing the entire excess escrow surplus as the "economic benefit" to the class -- it was not. All of the parties knew that without a lawsuit, all of the excess escrow surplus would have been returned to the individual class members at the end of their mortgages -- because it was indisputably theirs.

10. Defendants' conduct in the *Hoffman* Action constitutes a violation of RICO, 18 U.S.C. §§ 1962(c), 1962(d), and 1964(c), because defendants devised, conspired to devise, and intended to devise a scheme and artifice to defraud plaintiffs through a pattern of racketeering activity in order to obtain money from plaintiffs by means of false and fraudulent pretenses, representations, and promises and committed numerous predicate acts of mail and wire fraud in order to implement their scheme and artifice to defraud plaintiffs.

11. Defendants' conduct in the *Hoffman* Action constitutes a violation of Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, because defendants, acting under color of state law, deprived plaintiffs of their property without due process of law and deprived plaintiffs of rights, privileges, or immunities secured by the United States Constitution and the laws of the United States.

12. Defendants' conduct in the *Hoffman* Action also gives rise to numerous common law claims, including fraud,

fraudulent concealment, negligent misrepresentation, attorney malpractice, breach of fiduciary duty, and conversion.

13. Plaintiffs in this action, all of whom were members of the plaintiff class in the *Hoffman* Action, seek to recover their actual damages, totaling several million dollars, resulting from defendants' conduct in the *Hoffman* Action and, in addition, seek an award of treble damages, exemplary damages, attorneys' fees, and costs.

THE PARTIES

14. Plaintiffs Dexter J. Kamilewicz and Gretchen L. Kamilewicz reside in a home located at Sea Meadows Lane, Yarmouth, Maine 04096. The home is owned by Gretchen Kamilewicz and is secured by a mortgage loan for which Dexter Kamilewicz and Gretchen Kamilewicz are the mortgagors/borrowers.

15. When Mr. and Mrs. Kamilewicz refinanced their home on October 23, 1992, they did so with a mortgage loan from defendant BancBoston.

16. Plaintiff Martha E. Preston currently resides at E11583A Mine Road, Baraboo, Wisconsin 53913.

17. On November 20, 1989, Ms. Preston purchased a home located at Sugarloaf Street Extension, South Deerfield, Massachusetts 01373. She financed the purchase of her home with a mortgage loan from NewBoston Mortgage Corporation. On December 5, 1989, Ms. Preston's mortgage

was transferred to BancBoston for servicing and was serviced by BancBoston until Ms. Preston sold the property on October 16, 1995.

18. Defendant Bank of Boston Corporation is a registered bank holding company incorporated in Massachusetts with its principal place of business in Massachusetts. Through a network of national and state banking subsidiaries, Bank of Boston conducts business throughout the United States, including within the state of Illinois.

19. Defendant BancBoston Mortgage Corporation is a Florida corporation engaged in the business of first mortgage loan servicing. BancBoston conducts its business not only from its principal place of business located at 7301 Baymeadows Way, Jacksonville, Florida 32256, but also from various branch locations throughout the United States, including a branch office located in Schaumburg, Cook County, Illinois.

20. Defendant Burr & Forman is a partnership that is organized and that exists under the laws of the state of Alabama and that has its principal place of business in Birmingham, Alabama.

21. From June 1991 through at least March 1995, Burr & Forman served as legal counsel to defendants Bank of Boston and BancBoston in connection with Bank of Boston

and BancBoston's defense and settlement of the *Hoffman* Action.

22. Defendant T. Thomas Cottingham is an attorney licensed to practice law within the state of Alabama. At all times from May 28, 1991 until the present, defendant Cottingham has been a member of the law firm of Burr & Forman, a partnership with its principal place of business in Birmingham, Alabama.

23. Defendants John or Jane Does 1 through 25 are members of or employed by defendant Burr & Forman and participated in the scheme set forth in paragraphs 88 through 107.

24. Defendants Bank of Boston Corporation, BancBoston Mortgage Corporation, Burr & Forman, Cottingham, and John or Jane Does 1-25 hereafter will be referred to collectively as the "bank defendants."

25. Defendant Ezell & Sharbrough is a partnership that is organized and exists under the laws of the state of Alabama and that has its principal place of business in Mobile, Alabama.

26. From June 1991 through at least March 1995, Ezell & Sharbrough purported to serve as legal counsel to the plaintiffs, named and unnamed, in the *Hoffman* Action.

27. Defendant Mark Ezell is an attorney licensed to practice law within the state of Alabama. At all times from May 28, 1991 until the present, defendant Ezell has been a member of the law firm of Ezell & Sharbrough, a partnership with its principal place of business in Mobile, Alabama.

28. Defendant John W. Sharbrough, III is an attorney licensed to practice law within the state of Alabama. At all times from May 28, 1991 until the present, defendant Sharbrough has been a member of the law firm of Ezell & Sharbrough, a partnership with its principal place of business in Mobile, Alabama.

29. Defendant Edelman & Combs is a partnership that is organized and exists under the laws of the state of Illinois and that has its principal place of business in Chicago, Illinois.

30. From June 1991 through at least March 1995, Edelman & Combs purported to serve as legal counsel to the plaintiffs, named and unnamed, in the *Hoffman* Action.

31. Defendant Daniel A. Edelman is an attorney licensed to practice law within the state of Illinois. At all times from May 28, 1991 until the present, defendant Edelman has been a member of the law firm of Edelman & Combs, a partnership with its principal place of business in Chicago, Illinois.

32. Defendant Lawrence Walner & Associates is a sole proprietorship that is organized and that exists under the laws of the state of Illinois and that has its principal place of business in Chicago, Illinois.

33. From June 1991 through at least March 1995, Lawrence Walner & Associates purported to serve as legal counsel to the plaintiffs, named and unnamed, in the *Hoffman* Action.

34. Defendant Lawrence Walner is an attorney licensed to practice law within the state of Illinois. At all times from May 28, 1991 until the present, defendant Walner has been the principal of Lawrence Walner & Associates, a law firm with its principal place of business in Chicago, Illinois.

35. Defendants John or Jane Does 26 through 50 are members of or employed by defendants Ezell & Sharbrough, Edelman & Combs, Lawrence Walner & Associates or Burr & Forman and participated in the scheme set forth in paragraphs 88 through 107.

36. Defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26 through 50 hereafter will be referred to collectively as the "counsel defendants."

CLASS ACTION ALLEGATIONS

37. Plaintiffs in this action were members of the plaintiff class in the *Hoffman* Action. They seek to have this suit declared a class action under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure for themselves and on behalf of all other persons who were members of the subclass certified as Subclass Number One in the *Hoffman* Action, as that subclass is defined in paragraph 49(a) of this Complaint. Excluded from the Class are defendants herein; members of the immediate family of each of the individual defendants; any person, firm, trust, corporation, officer, director or other individual or entity in which any defendant has a controlling interest, or that is related to or affiliated with any of the defendants; Carl F. Hoffman and Deborah L. Hoffman, the named plaintiffs in the *Hoffman* Action; and the legal representatives, heirs, successors-in-interest or assigns of any such excluded person.

38. The members of the Class are so numerous that joinder of each member in this action is impracticable. While the exact number of Class Members is unknown to plaintiffs at this time, they are believed to number in the hundreds of thousands.

39. Plaintiffs fairly and adequately will represent and protect the interests of the members of the Class. They are committed to litigating this matter vigorously. Plaintiffs are greatly disturbed at being victims of the deceptive, misleading, and fraudulent practices of the attorneys claiming

to have acted on their behalf in the *Hoffman* Action, the attorneys representing Bank of Boston and BancBoston in the *Hoffman* Action, and Bank of Boston and BancBoston themselves. Plaintiffs wish to see that the wrongs that have been committed are remedied. To ensure that the claims of the Class are litigated vigorously, plaintiffs have retained competent and experienced counsel to prosecute this action.

40. Plaintiffs' claims are typical of the claims of the other members of the Class because plaintiffs and all the Class Members' damages arise from and were caused by the same deceptive, misleading, and false representations and omissions made by or chargeable to defendants. Plaintiffs do not have any interests antagonistic to, or in conflict with, the Class they seek to represent.

41. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because of the number of Class Members, the expense and burden of individual litigation would make it virtually impossible for each Class Member to seek redress for the wrongful conduct alleged. Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

42. The prosecution of separate actions by individual Class Members would create a risk of inconsistent and varying results that could establish incompatible standards of conduct for the various defendants.

43. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are the following:

(a) Whether the Notice of Hearing of Proposed Settlement of Class Action prepared by defendants and mailed to plaintiffs on December 9 and 10, 1993, and the Notice of Hearing on Proposed Settlement of Class Action prepared by defendants and caused by defendants to be published in *USA Today* on December 13 and 20, 1993, contained deceptive, materially misleading, and false representations and statements of facts, or omitted to state material facts, concerning the settlement proposed by defendants;

(b) Whether defendants violated Section 1962 of RICO, 18 U.S.C. § 1962;

(c) Whether defendants conspired to violate Section 1962 of RICO, 18 U.S.C. § 1962(d);

(d) Whether defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 violated plaintiffs' civil rights pursuant to 42 U.S.C. § 1983;

(e) Whether defendants defrauded plaintiffs;

(f) Whether defendants fraudulently concealed material facts from plaintiffs;

(g) Whether defendants negligently misrepresented material facts;

(h) Whether defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 committed attorney malpractice in connection with their purported representation of plaintiffs in the *Hoffman* Action;

(I) Whether defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 breached their fiduciary duty to plaintiffs in connection with their purported representation of plaintiffs in the *Hoffman* Action;

(j) Whether defendants Bank of Boston and BancBoston are liable for conversion as a result of their orchestrating and acceding to the disbursement of funds from plaintiffs' individual escrow accounts for the purpose of paying attorneys' fees in the *Hoffman* Action;

(k) Whether defendants Bank of Boston and BancBoston breached their fiduciary duty to plaintiffs by

orchestrating and acceding to the disbursement of funds from plaintiffs' individual escrow accounts for the purpose of paying attorneys' fees in the *Hoffman* Action and in denominating that disbursement a "miscellaneous disbursement" on each plaintiff's annual escrow statement;

(l) Whether defendants acted willfully, recklessly or with gross negligence in omitting and/or misrepresenting material facts and otherwise through their participation in the conduct alleged in this Complaint; and

(m) The appropriate measure and extent of damages sustained by plaintiffs.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

The Hoffman Action -- The Members of the Class

44. On or about May 28, 1991, Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 commenced the *Hoffman* Action in the Circuit Court of Mobile County, Alabama on behalf of Carl F. Hoffman, Deborah L. Hoffman, and others situated similarly.

45. The class of individuals that the counsel defendants purported to represent included all persons who: (a) at any time during the ten years before the filing of the *Hoffman* Action (b) were obligated under, or owned property secured by, a residential real estate mortgage providing for an

escrow account for taxes and insurance, (c) had an escrow account, and (d) had their escrow deposits computed by BancBoston or any other part of the Bank of Boston organization in the same manner as the escrow deposits of Mr. and Mrs. Hoffman were calculated. Hoffman Complaint, ¶ 12.

46. On July 2, 1992, the Alabama Court entered an Order conditionally certifying the *Hoffman* Action as a class action pursuant to Rule 23(b)(2), Alabama Rules of Civil Procedure. The Court's Order certifying the class was essential to the *Hoffman* Action proceeding as a class action. Among other findings, the court found that "[t]he attorneys representing the Hoffmans and the class are qualified, experienced and able to conduct class action litigation." Certification of Class Order, at p. 2.

47. On November 22, 1993, defendants filed a Joint Motion and Stipulation in which they requested, among other things, that the Court enter an Order conditionally approving of a settlement class consisting of "all persons whose loan was secured by a residential real estate mortgage and for whom defendants, or their predecessors ("BancBoston"), acted as servicer at any time from May 28, 1981 to the present." Joint Motion and Stipulation, ¶ 1.

48. On December 6, 1993, the Alabama Court entered an Order conditionally approving the settlement class as defined in paragraph 47 of this Complaint.

49. In its December 6, 1993 Order, the Court also approved a Notice of Hearing on Proposed Settlement of Class Action submitted by defendants, which, among other things, divided the *Hoffman* class into two subclasses defined as follows:

(a) Subclass Number One (consisting of active loans) comprised all persons whose residential real estate mortgage loans BancBoston or its predecessors serviced or subserviced and for which escrow accounts were maintained for at least six months, and were still servicing or subservicing on November 9, 1993; and

(b) Subclass Number Two (consisting of former loans) comprised all persons whose residential real estate mortgage loans BancBoston or its predecessors serviced or subserviced for a minimum of six months at any time after May 28, 1981 for which escrow accounts were maintained and that were paid off, transferred, waived or otherwise removed from BancBoston's books as of November 9, 1993.

50. As of December 6, 1993, plaintiffs Dexter Kamilewicz, Gretchen Kamilewicz, and Martha Preston were members of Subclass Number One of the *Hoffman* class because they were persons whose loans were secured by a residential real estate mortgage for whom defendant BancBoston had been acting as servicer since October 23, 1992 and December 5, 1989, respectively, and for whom defendant BancBoston continued to act as servicer.

The Hoffman Action -- The Nature of the Allegations

51. In the complaint filed on behalf of the *Hoffman* class, the counsel defendants alleged that "[e]ach of the mortgages involved provided for the monthly deposit of 1/12 of annual escrow requirements and a surplus of between zero and two months' escrow payments." Hoffman Complaint, ¶ 18.

52. The counsel defendants further alleged that "[t]he actual practice of BancBoston Mortgage with respect to the amounts which it requires its mortgagors to deposit in escrow each month does not conform to the language in its mortgages. Instead, BancBoston Mortgage required deposits that would create and maintain substantial surpluses." Hoffman Complaint, ¶ 20.

53. Moreover, the counsel defendants alleged that "[a]s a result of BancBoston Mortgage's practice, Mr. and Mrs. Hoffman and each of the other class members have been assessed excessive escrow deposit requirements. Their monthly payments have been larger than they should have been." Hoffman Complaint, ¶ 32.

54. According to the counsel defendants, "[a]ll benefits from the excess funds deposited have been retained by BancBoston Mortgage, as provided by the mortgage instruments, and the Bank of Boston Group. As a result,

BancBoston Mortgage and Bank of Boston have been unjustly enriched." Hoffman Complaint, ¶ 33.

55. In addition, the counsel defendants alleged in the Hoffman complaint that "[t]he imposition of excessive escrow deposit requirements constituted a breach of the contractual agreement set forth in the mortgages signed by Mr. and Mrs. Hoffman and each class member" and that as a result of the alleged breach, "Mr. and Mrs. Hoffman and each class member suffered actual damages, in that they were deprived of money and/or in that their real estate was encumbered by unlawfully inflated deposit requirements." Hoffman Complaint, ¶¶ 36, 38.

56. After the *Hoffman* Action was conditionally certified by the Alabama Court as a class action on July 2, 1992, the counsel defendants filed two amended complaints.

57. First, the counsel defendants filed an amended complaint adding claims under the Massachusetts Unfair and Deceptive Acts and Practices statutes or, alternatively, similar statutes in force in other states.

58. Then, on July 13, 1993, the counsel defendants filed a Second Amended Complaint adding claims for fraud and breach of duty.

The Hoffman Action -- Bank of Boston and BancBoston's Defense

59. In the Answer filed by Bank of Boston and BancBoston, by and through their attorneys, Bank of Boston and BancBoston denied that they had breached their mortgage escrow agreements with Mr. and Mrs. Hoffman and with the other members of the *Hoffman* class.

60. In addition, Bank of Boston and BancBoston raised various affirmative defenses, including, but not limited to, the following:

(a) That BancBoston complied with the provision within the Hoffmans' mortgage note permitting the lender "to 'reasonably' estimate an escrow amount for the borrower to pay monthly and to make 'reasonable estimates' of the taxes, insurance and other assessments that must be paid in the future," Answer, ¶ 3 at p. 7;

(b) That BancBoston complied with a provision in many of the mortgages at issue that stated that it was entitled to collect and hold funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for borrowers' escrow accounts under the federal Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* ("RESPA"), Answer, ¶ 4 at p.7;

(c) That the United States Department of Housing and Urban Development ("H.U.D.") expressly had approved BancBoston's method of accounting and analysis of escrow accounts, Answer, ¶ 6 at p. 8;

(d) That BancBoston's method of escrow accounting and analysis was consistent with Section 10 of RESPA, 12 U.S.C. § 2609, Answer, ¶ 7 at p. 8; and

(e) That BancBoston's method of escrow accounting and analysis complied with the laws and regulations of the United States Congress, H.U.D., the Veterans Administration, the Federal Housing Administration, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and other United States agencies and quasi-governmental agencies. Answer, ¶ 8 at p. 8.

61. On October 1, 1993, the bank defendants prepared and filed an Answer to Plaintiffs' Second Amended Complaint in which Bank of Boston and BancBoston again denied any liability to plaintiffs and again asserted numerous defenses, including those set forth in paragraph 60 above.

The Hoffman Action -- Partial Summary Judgment

62. On July 16, 1993, the counsel defendants filed a motion for partial summary judgment on plaintiffs' breach of contract claim.

63. On October 12, 1993, after hearing oral argument on plaintiffs' motion, the Alabama Court granted plaintiffs' motion and entered an Order declaring, among other things, that the escrow account deposit requirements imposed on the Hoffmans by BancBoston exceeded those permitted under the mortgage contract and thus constituted a breach of the mortgage contract.

64. The Alabama Court's October 12, 1993 Order also declared that BancBoston had breached its mortgage contracts with the other members of the *Hoffman* class upon whom BancBoston imposed escrow account requirements similar to those imposed upon the Hoffmans. The Court's October 12, 1993 Order further required the counsel defendants to submit a proposed form of notice to the class members.

The Hoffman Action -- Notice to the Class

65. Pursuant to the October 12, 1993 directive from the Alabama Court, the counsel defendants submitted to the Court for its review and approval a proposed form of notice to the class members.

66. The proposed Notice to the Class submitted to the Court by the counsel defendants was deceptive, materially misleading, and fraudulent in that the counsel defendants misrepresented that the attorneys' fees requested by the counsel defendants would not exceed one-third of the economic benefit to the class when, in fact, the counsel

defendants knew that most, if not all, class members would pay attorneys' fees in an amount far in excess of one-third of the economic benefit received by them.

67. The proposed Notice to the Class submitted to the Court by the counsel defendants was deceptive, materially misleading, and fraudulent in that in the Notice the counsel defendants misrepresented that the settlement was "fair, reasonable, adequate, and in the best interests of the class," and that the attorneys' fees were "reasonable," when, in fact, the counsel defendants knew that the settlement was not fair, reasonable, adequate or in the best interests of the class and that the attorneys' fees were not reasonable.

68. The proposed notice to the Class submitted to the Court by the counsel defendants was deceptive, materially misleading, and fraudulent in that the counsel defendants failed to disclose to the Court or to plaintiffs that the counsel defendants, in their capacity as class counsel, intended to seek attorneys' fees in an amount exceeding the total monetary recovery of the class, and as a result, that most, if not all, class members would suffer a net out-of-pocket loss.

69. On October 26, 1993, the bank defendants filed in the Alabama Court Defendants' Notice of Filing Proposed Notice of Class Action and Defendants' Objections to Plaintiffs' Proposed Notice of Class Action. On October 25, 1993, the bank defendants served this pleading on the counsel

defendants via first-class mail. After it was filed, this pleading appears to have been withdrawn as moot.

70. In their Notice of Filing Proposed Notice of Class Action and Objections to Plaintiffs' Proposed Notice of Class Action, the bank defendants stated that the notice proposed by the counsel defendants was misleading in that, among other things:

(a) "[I]t misleads potential class members into believing that there are only 'benefits' of this litigation and fails to notify them that there are substantial adverse effects... that are certain to occur... [including]: (1) the monthly escrow payments of many borrowers will increase; (2) monthly escrow payments will fluctuate substantially from year to year as opposed to changing only slightly from year to year as they have in the past; (3) many borrowers will be called upon to make extraordinary additional payments to cover taxes and insurance because there will be insufficient funds in their escrow accounts to cover increases in taxes and insurance as they occur; (4) the risk that there will be insufficient funds in the escrow accounts will increase substantially, causing more borrowers to lose their houses as a result of inability to pay taxes or insurance; [and] (5) the cost of financing and refinancing will increase for all borrowers." Defendants' Notice of Filing Proposed Notice of Class Action and Defendants' Objections to Plaintiffs' Proposed Notice of Class Action, ¶ 2 at pgs. 4-5; and

(b) It fails to inform members of the *Hoffman* class that "if the Court orders a refund out of the escrow accounts... or these defendants [BancBoston Mortgage Corporation] change their accounting methods in order to comply with the Order and refund escrow funds, and plaintiffs' counsel seek attorneys' fees out of that refund, then every class member will suffer an actual net out-of-pocket loss as a result of this lawsuit. That loss will be paid to their lawyers." Defendants' Notice of Filing Proposed Notice of Class Action and Defendants' Objections to Plaintiffs' Proposed Notice of Class Action, ¶ 3 at p. 5.

71. On October 26, 1993, the bank defendants also filed their own Notice Of Class Action, which also appears thereafter to have been withdrawn as moot. The bank defendants' proposed Notice of Class Action included the following statement: "if fees and expenses [for Class Counsel] were paid out of the surplus fund [as proposed by Class Counsel], the amount of the refund paid to each class member would be reduced accordingly. Each Class member would have a net out-of-pocket loss as a result of this lawsuit and the settlement advocated by the Class Representatives and Class Counsel." Defendants' Proposed Notice of Class Action, at p. 4.

72. The attorneys' fees that the bank defendants later acquiesced to were determined pursuant to the precise method condemned by the bank defendants as described in ¶¶ 70 and 71 above, and the bank defendants' belief that if the

fees were calculated pursuant to that method, "every class member will suffer a net out-of-pocket loss as a result of this lawsuit" was entirely accurate.

The Hoffman Action -- The Settlement Negotiations

73. Before the Alabama Court entered its October 12, 1993 Order granting plaintiffs' motion for partial summary judgment, the bank defendants offered to settle the *Hoffman* Action by changing BancBoston's method of calculating escrow amounts to conform to the method advocated by the counsel defendants.

74. In particular, the bank defendants offered the counsel defendants the following proposal:

(a) BancBoston would change from an "individual item analysis" method of computing escrow payments to an "aggregate" method;

(b) If this change in the method of computing escrow payments resulted in a surplus in BancBoston's escrow deposit account, then BancBoston would refund to each class member the amount of the surplus; and

(c) BancBoston would pay from its own funds approximately $500,000 to cover all attorneys' fees and costs incurred by class counsel.

75. The net effect of the bank defendants' offer was that the *Hoffman* class members would not be responsible for the payment of any attorneys' fees and costs and would receive 100% of the surplus in their escrow accounts.

76. The counsel defendants rejected the bank defendants' offer to pay their attorneys' fees and, instead, insisted first, that attorneys' fees be a much larger amount than that offered by the bank defendants; second, that the attorneys' fees be paid not by the bank, but, rather, be taken from the individual escrow accounts of the *Hoffman* class members; and, third, that the bank defendants agree not to object to the counsel defendants' request for that amount of attorneys' fees to be taken from their clients' accounts.

77. The settlement agreed to by defendants in November 1993 called for the payment of attorneys' fees to the counsel defendants in a much larger amount than that offered by the bank defendants; for those attorneys' fees to be taken from the individual escrow accounts of the *Hoffman* class members; and for the bank defendants not to object to counsel defendants' request for that amount of fees to be taken from their clients' accounts.

78. In other words, defendants entered into an agreement that provided for payment of attorneys' fees in the very same manner as had been proposed in October 1993 by the counsel defendants, and to which the bank defendants then had objected because "every class member will suffer an

actual net out-of-pocket loss as a result of this lawsuit. That loss will be paid to their lawyers." Defendants' Notice of Filing Proposed Notice of Class Action and Defendants' Objections to Plaintiffs' Proposed Notice of Class Action, ¶ 3 at p. 5.

79. At the time that defendants entered into the settlement agreement calling for the payment of attorneys' fees from the individual escrow accounts of the *Hoffman* class members, each and every defendant knew that the settlement would result in an award of attorneys' fees in excess of the total economic benefit to the class; that most, if not all, class members would pay attorneys' fees in an amount far in excess of one-third of the economic benefit to him or her; and, as a result, that most, if not all, class members would suffer a net out-of-pocket loss.

80. In addition, at the time the defendants entered into the settlement agreement calling for the payment of attorneys' fees from the individual escrow accounts of the *Hoffman* class members, each and every defendant knew that the settlement would result in a payment of attorneys' fees to class counsel in an amount in excess of $14 million; that the settlement was not "fair, reasonable, adequate and in the best interests of the class;" and that the attorneys' fees to be awarded were not "reasonable."

The Hoffman Action -- The Settlement Terms

81. The terms of the settlement ultimately agreed to by the parties, memorialized in the Consent Decree dated January 24, 1994, and approved by the Alabama Court on the same date, included the following:

(a) An agreement by BancBoston to utilize in the future the "aggregate" or "cash" method of escrow account analysis, which defendants claimed would reduce by approximately 19% the amount of escrow funds BancBoston could hold;

(b) A one-time interest payment to each *Hoffman* class member in an amount ranging from $0.00 to $8.76; and

(c) A refund, prior to the termination of each class member's mortgage, of excess escrow funds in each class member's escrow account (approximately 19% of that class member's escrow account), from which would be deducted the attorneys' fees requested by the counsel defendants.

82. On December 3, 1993, H.U.D. published a Notice of Proposed Rulemaking establishing escrow accounting procedures under Sections 6(g) and 10 of RESPA. 58 Fed. Reg. 64066 (Dec. 3, 1993). On October 26, 1994, H.U.D. published regulations, effective May 24, 1995, establishing escrow accounting procedures under RESPA, 12

U.S.C. § 2601 *et seq.* 59 Fed. Reg. 53890 (Oct. 26, 1994). Under these regulations, BancBoston must apply the "aggregate" or "cash" method of escrow account analysis to all escrow account analyses conducted after October 26, 1997. This is the same relief that the settlement of the *Hoffman* Action achieved.

83. Because the excess escrow funds in each class member's account are indisputably already the property of that class member and always would be the property of that class member, the economic benefit of the refund of the excess escrow funds is not the amount of those funds, but, rather, is the economic benefit to the class member of receiving the money now, rather than at the termination of the mortgage.

84. In a letter to defendant Cottingham dated December 14, 1993, defendant Sharbrough confirmed that the actual economic benefit conferred upon the class as a result of the settlement was the difference between the value of receiving the refund of the escrow surplus "now," as compared with the value of receiving the escrow surplus later, at the termination of the mortgage.

85. Despite their knowledge that the true economic benefit to the class was the value of receiving the refund of the excess escrow amounts now rather than later, the terms of the settlement ultimately agreed to by the parties, memorialized in the Consent Decree dated January 24, 1994, and approved by the Alabama Court on the same date, awarded attorneys'

fees to the *Hoffman* class counsel calculated as 28% of the entire escrow surplus -- not the value of receiving the refund of that surplus now rather than later.

86. This resulted in far larger fees to the counsel defendants than had the fees been calculated on the basis of what all defendants knew was the true economic benefit to the *Hoffman* class (the value of the earlier availability of the surplus). The escrow surplus was estimated to be approximately 19% of BancBoston's entire $223 million escrow account, resulting in attorneys' fees of at least $14 million.

87. Thus, the counsel defendants received as attorneys' fees in the *Hoffman* Action not 28% of the actual economic benefit to the class, but 28% of the excess escrow funds that always had belonged and always would belong to the class.

The Scheme

88. By misrepresenting to the Court the ultimate economic effect of the *Hoffman* Action on the class members, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties induced the Alabama Court to assume jurisdiction over the nationwide class.

89. On November 19, 1993, defendants memorialized the settlement agreement into which they had

entered by filing with the Alabama Court a Joint Motion and Stipulation in which they asked the Court, among other things, (a) to approve conditionally the settlement class as all persons whose loan was secured by residential real estate mortgage and for whom defendants or their predecessors acted as servicer at any time from May 28, 1981 to the present; (b) to grant tentative approval of a proposed Consent Decree prepared by defendants and submitted by them to the Court; and (c) to approve the Notice of Hearing on Proposed Settlement of Class Action prepared by defendants for the purported purpose of informing the *Hoffman* class of the proposed settlement.

90. Under the Alabama Rules of Civil Procedure, a class action cannot be dismissed or compromised without court approval. Thus, to obtain the Court's approval of their proposed Consent Decree and Notice of Hearing on Proposed Settlement of Class Action, and in order to ensure that the counsel defendants would be awarded the exorbitant fees that they sought, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties omitted from their Joint Motion and Stipulation, from the Consent Decree, and from the Notice of Hearing on Proposed Settlement of Class Action attached to the Joint Motion and Stipulation, any mention of the fact that the agreement into which they entered, if approved and enforced by the Court, would result in a net out-of-pocket loss to most, if not all, class members, and that the attorneys' fees taken from the individual escrow accounts of the class members would far

exceed one-third of the economic benefit to the individual class members.

91. Instead, defendants falsely represented to the Court in their Joint Motion and Stipulation that "[t]he proposed settlement is fair, reasonable and adequate in light of the substantial benefits offered to plaintiffs and the class members by defendants as compared to the uncertainties of litigation of the claims involved, the significant cost, time and effort such litigation would entail on behalf of all parties regardless of the outcome, and the considerable burden that continued litigation would impose upon the Court and upon the relationship that exists between the plaintiffs, the class members and defendants." Joint Motion and Stipulation, ¶ 3 at p. 3.

92. To ensure that the counsel defendants would be awarded the exorbitant attorneys' fees that they sought, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties prepared and filed with the Court a Notice of Hearing on Proposed Settlement of Class Action that contained deceptive, materially misleading, and false representations and statements of fact, or omitted to state material facts, by stating, among other things, that:

(a) "Counsel for the class have determined that the proposed settlement is fair, reasonable, adequate and in the best interests of the class," Notice of Hearing on

Proposed Settlement of Class Action, at p. 2, when, in fact, defendants knew that the proposed settlement was structured so as to result in a payment of at least $14 million in attorneys' fees to the counsel defendants from the individual escrow accounts of the class members, while most, if not all, class members would suffer a net out-of-pocket loss;

(b) By participating in the class settlement, members of the class would be entitled to and would receive monetary distributions, when, in fact, the defendants knew that the net result of the settlement would not be a monetary distribution to each class member, but a monetary loss to most, if not all, class members; and

(c) Stated that the counsel defendants would request attorneys' fees to be paid out of each escrow account based upon a percentage not to exceed one-third of the "economic benefit" to the class, Notice of Hearing on Proposed Settlement of Class Action, ¶ 8 at p. 5, when, in fact, defendants knew that each member of the *Hoffman* class who had an escrow account at the time of the settlement would pay attorneys' fees in an amount far in excess of one-third of his or her economic benefit.

93. At the time they prepared and filed their proposed Notice of Hearing on Proposed Settlement of Class Action, defendants knew that if the proposed notice clearly informed class members that the settlement agreement would result in a net monetary loss for most, if not all, class

members, and that each individual class member would pay attorneys' fees in an amount far exceeding one-third of the economic benefit received by that class member, then most, if not all, class members either would have opted out of the class or would have objected to the terms and conditions of the settlement, thereby reducing the amount of attorneys' fees available to the counsel defendants.

94. On December 6, 1993, the Alabama Court entered an Order conditionally approving the settlement class and tentatively approving the Consent Decree prepared and submitted jointly by defendants in this action.

95. In its December 6, 1993 Order, the Alabama Court ordered BancBoston to send to the last known address of each member of the *Hoffman* class a copy of the Notice of Hearing on Proposed Settlement of Class Action that had been prepared jointly by the defendants in this case.

96. On December 9 and 10, 1993, in furtherance of their scheme to defraud, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties sent or caused to be sent through the Untied States mail approximately 415,000 copies of the 12-page, single-spaced Notice of Hearing on Proposed Settlement of Class Action containing the deceptive, materially misleading, and false statements, or omitting to state material facts, as set forth in paragraph 92 above.

97. On December 13, and 20, 1993, in furtherance of their scheme to defraud, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties caused to be published in *USA Today* a Notice of Hearing on Proposed Settlement of Class Action containing the deceptive, materially misleading, and false statements, or omitting to state material facts, as set forth in paragraph 92 above.

98. After sending out approximately 415,000 deceptive, materially misleading, and false Notices to past and current holders of BancBoston mortgages, and after publishing two similarly deceptive, materially misleading, and false Notices in *USA Today,* defendants Ezell & Sharbrough, Ezell, and Sharbrough fielded thousands of telephone calls and replied to hundreds of letters from Class Members requesting additional information regarding the proposed settlement.

99. In responding to such telephone calls and letters, it is inevitable that defendants Ezell & Sharbrough, Ezell, and Sharbrough knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties continued to use the Untied States mail and interstate wires to make deceptive, materially misleading, and false statements regarding the settlement in that they inevitably continued to make representations intended to deceive class members into believing that they would receive a monetary benefit from the settlement and that their attorneys would only receive one-third of that economic benefit; to conceal from their clients

that the settlement would result in a net out-of-pocket loss for most, if not all, of them; and to conceal that the counsel defendants would be awarded attorneys' fees taken from the individual escrow accounts of each class member in an amount far exceeding one-third of the economic benefit received by each class member.

100. Due to the deceptive, materially misleading, and false representations in the Notices mailed to class members and published in *USA Today*, only 1,500 potential class members, less than 0.4% of the potential class, requested that they be excluded from the class prior to the January 3, 1994 cut-off date for filing Requests for Exclusion (and many of these 1,500 potential class members appear to have "opted-out" by mistake), despite the fact that most, if not all, of the class members would suffer a net out-of-pocket loss as a result of their participation in the *Hoffman* Action.

101. The Alabama Court held a fairness hearing regarding the fairness, reasonableness, and adequacy of the proposed settlement on January 10 and 11, 1994. During that fairness hearing, defendants testified and presented expert testimony that the economic benefit to the class was at least equivalent to the amount of the escrow funds to be refunded to the members of the *Hoffman* class rather than the much smaller value of receiving that refund now as opposed to receiving it later when the mortgage was paid off. By knowingly, intentionally, recklessly, negligently and in wanton breach of their fiduciary duties exaggerating the

economic benefit to the *Hoffman* class, the counsel defendants obtained an excessive, exorbitant, and unwarranted award of attorneys fees calculated as a percentage of the exaggerated "economic benefit" to the *Hoffman* class.

102. At no time during their respective arguments before the Court during that fairness hearing did any of the defendants inform the Court that because of the manner in which defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties had exaggerated and miscalculated the economic benefit to the *Hoffman* class that the settlement agreement into which they had entered, if approved by the Court, would result in a net out-of-pocket loss to most, if not all, class members, or that each individual class member would pay attorneys' fees in an amount that would far exceed one-third of his or her economic benefit; nor did any of the defendants inform the Court of the materially misleading and false statements within the Notice of Hearing on Proposed Settlement of Class Action prepared and submitted to the Court by defendants.

103. Instead, during the January 10 and 11, 1994 fairness hearing, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties represented to the Court, as they had in the Joint Motion and Stipulation itself, that the settlement agreement into which they had entered was fair to the members of the class and that the attorneys' fees were reasonable. In fact, defendants knew that the settlement would result in a payment of attorneys' fees

to counsel defendants from the individual escrow accounts of the class members in an amount in excess of $14 million, while most, if not all, class members would suffer a net out-of-pocket loss, and that each individual class member would pay attorneys' fees far exceeding one-third of the economic benefit to that class member.

104. On January 24, 1994, having concealed from the Court and the members of the *Hoffman* class the true monetary impact of the settlement on the Class Members, defendants secured the Court's approval of the settlement. The Court specifically found the settlement to be fair and reasonable and the requested attorneys' fees to be reasonable in light of fees awarded in other cases.

105. After fraudulently obtaining the Court's approval of the settlement, defendants implemented the terms and conditions of the settlement and knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties took the following actions in furtherance of their scheme:

(a) Within 90 days of the Court's approval of the settlement, defendant BancBoston made an electronic deposit, in an amount calculated in accordance with paragraph 8 of the Consent Decree, to the account of each class member who was a current BancBoston mortgage holder. Paragraph 8 of the Consent Decree provided that Subclass Number One plaintiffs would receive an interest payment calculated as "an

amount equal to fifty percent (50%) multiplied by seven point five (7.5) multiplied by (four (4) percent minus the interest rate paid on escrow, if any), multiplied by the average escrow surplus, which has been determined to be $58.41." These payments are believed to have ranged from $0.0 to $8.76.

(b) Beginning 90 days after the Court's approval of the settlement and continuing throughout the end of 1994, defendant BancBoston began deducting attorneys' fees from the escrow accounts of each of BancBoston's current mortgage holders in the amount of 5.32% of the balance of the account. This represented 28% of the 19% of BancBoston's escrow accounts that had been determined to be excessive surplus.

(c) After the attorneys' fees were deducted from each account, an amount believed to be in excess of $14 million was paid by BancBoston to defendants Ezell & Sharbrough, Ezell, and Sharbrough, who later distributed an unknown portion of those funds to defendants Edelman & Combs, Edelman, Lawrence Walner & Associates, and Walner; and

(d) In January 1995, 1994 Annual Tax and Interest Statements for 1994 were mailed by defendant BancBoston to each of its current mortgage holders listing a deduction labeled only as a "miscellaneous disbursement." Each class member's individual disbursement was in an amount well in excess of the one-third of the economic benefit

received by that class member, and therefore, well in excess of the amount represented in the Notice of Hearing on Proposed Settlement of Class Action. The disbursement, in fact, was a payment of attorneys' fees to the counsel defendants, and the bank defendants' denominating it as a mere "miscellaneous disbursement" was a further act of fraud and deception designed to conceal the scheme from plaintiffs.

106. After BancBoston mailed the 1994 Annual Tax and Interest Statements to plaintiffs in January 1995 and continuing through at least March 30, 1995, the bank defendants, in furtherance of defendants' scheme to defraud plaintiffs, knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties sent letters containing deceptive, misleading, and false statements to members of the *Hoffman* class who inquired about the "miscellaneous disbursements."

107. The letters sent by the bank defendants through the United States Mail, in furtherance of defendants' scheme to defraud plaintiffs and in an attempt to lull plaintiffs into a false sense of security, contained deceptive, materially misleading, and false representations and statement of fact, or omitted to state material facts, in that they:

(a) Failed to disclose that under Alabama law defendants Bank of Boston and BancBoston could have been obligated to pay attorneys' fees to the counsel defendants;

(b) Failed to acknowledge that Bank of Boston and BancBoston benefitted financially from the settlement because the settlement agreement provided for the payment of attorneys' fees from the individual escrow accounts of the *Hoffman* class members rather than by Bank of Boston and BancBoston themselves; and

(c) Cited decisions of the Alabama Supreme Court as support for the notion that an award of attorneys' fees in the range of 20%-33⅓% of the economic benefit to the class is appropriate in class action litigation, when defendants knew that most, if not all, members of the *Hoffman* class would pay attorneys' fees far in excess of that amount.

ALLEGATIONS UNDER 18 U.S.C. §§ 1961, et seq.

108. Plaintiffs Dexter J. Kamilewicz, Gretchen L. Kamilewicz, and Martha E. Preston are each a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

109. Each defendant is a "person" within the meaning of 18 U.S.C. §§ 1961(3), 1962(c), and 1962(d).

110. The *Hoffman* class, as defined in ¶ 3 of the Consent Decree approved by the Alabama Court on December 6, 1993, constitutes an association-in-fact "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c) (the "*Hoffman* Class Enterprise"). The activities of the *Hoffman* Class Enterprise affected interstate commerce.

111. Defendants are persons who are associated with and/or employed by the *Hoffman* Class Enterprise and who conducted or participated in, directly or indirectly, the conduct of the *Hoffman* Class Enterprise's affairs, as those affairs related to the transactions and occurrences described in paragraphs 88 through 107 of this Complaint, through a pattern of racketeering within the meaning of 18 U.S.C. §§ 1961(1)(B) and 1961(5).

112. The schemes and artifices to defraud described above in paragraphs 88 through 107 of this Complaint constituted a close-ended scheme comprised of numerous acts of mail and wire fraud, all of which were intended to, and did, defraud plaintiffs over a substantial period of time, beginning in June 1991 and continuing though at least March 1995.

COUNT I

Against All Defendants for Damages Under 18 U.S.C. §§ 1962(c) and 1964(c)

113. Paragraphs 1 through 112 are incorporated by reference herein as if they fully were alleged herein.

114. Defendants, among themselves and in combination and concert with others, known and unknown, devised and intended to devise a scheme and artifice to defraud plaintiffs in order to obtain money from plaintiffs by means of false and fraudulent pretenses, representations, and promises.

115. For the purpose of executing and furthering their scheme and artifice to defraud plaintiffs and in order to obtain money from plaintiffs by means of false and fraudulent pretenses, representations, and promises, defendants knowingly used the United States Mail and interstate wire communications for communications to the Alabama Court, for communications to and from members of the *Hoffman* class, and for communications to and from each other, in violation of 18 U.S.C. §§ 1341 and 1343, on numerous occasions beginning in June 1991 and continuing at least through March 1995, in that they caused the communications described in this Complaint to be placed in an authorized depository for mail and to be sent and delivered by the Postal Service, and cause such communications to be transmitted in interstate commerce by means of wire facilities, and took and received from the mail and interstate wire facilities communications sent by plaintiffs. Such use of the mail and interstate wire facilities by defendants in execution of the scheme and artifice to defraud plaintiffs by means of false and fraudulent pretenses, representations, and promises constitutes a pattern of racketeering activity, as defined in 18 U.S.C. § 1961(5).

116. By reason of their scheme and artifice to defraud, defendants violated the provisions of 18 U.S.C. § 1962(c), and as a result of this violation, defendants caused direct injury to the property of plaintiffs in an amount to be determined at trial.

COUNT II

Against All Defendants for Damages Under 18 U.S.C. §§ 1962(d) and 1964(c)

117. Paragraphs 1 through 116 are incorporated by reference herein as if they fully were alleged herein.

118. Beginning in June 1991 and continuing through at least March 1995, defendants violated 18 U.S.C. § 1962(d) by conspiring to violate 18 U.S.C. § 1962(c), in that each of these defendants knowingly conspired to defraud plaintiffs by knowingly participating in the conduct of the affairs of the *Hoffman* Class Enterprise through a pattern of racketeering activity.

119. Each of the defendants knew that numerous acts of mail and wire fraud would be committed under the auspices of the *Hoffman* Class Enterprise and agreed to their commission.

120. Each of the defendants was aware of the specific identities and activities of each of the other defendants.

121. By engaging in the conspiracy to defraud alleged herein, the defendants have violated 18 U.S.C. § 1962(d) and have caused direct injury to the property of plaintiffs in an amount to be determined at trial.

COUNT III

Against Defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 for Damages Under 42 U.S.C. § 1983

122. Paragraphs 1 through 121 are incorporated by reference herein as if they fully were alleged herein.

123. By engaging in the scheme and artifice to defraud described in paragraphs 88 through 107 of this Complaint, the counsel defendants deprived plaintiffs of their property without due process of law and deprived plaintiffs of rights, privileges or immunities secured by the United States Constitution and laws of the United States.

124. The counsel defendants knowingly took over, controlled, and abused the legal process by fraudulently obtaining the Court's approval of the class settlement and by implementing the terms of that settlement. As a result, plaintiffs maliciously and unconstitutionally were deprived of their property without due process of law.

125. The conduct of the counsel defendants in furtherance of their scheme to deprive plaintiffs of their property without due process of law was committed by persons acting under color of state law, as demonstrated by, but not limited to, the following:

(a) In furtherance of their scheme, the counsel defendants took over and controlled the judicial process by fraudulently obtaining the requisite court approval of the class settlement;

(b) The counsel defendants willfully and maliciously violated plaintiffs' civil rights through the knowing abuse of the legal process;

(c) The *Hoffman* Action, like all class action litigation in Alabama, could not have existed without the overt, significant participation of the state, including the trial judge, who has a fiduciary duty to protect the interests of absent class members. More specifically, without the participation of the Court, the *Hoffman* Action settlement could not have been approved and implemented; and

(d) The counsel defendants acted in the capacity of private attorneys general in representing the *Hoffman* class members and performed a governmental function in litigating public policy issues on behalf of a large constituency.

126. By reason of this conduct, pursuant to 42 U.S.C. §§ 1983 and 1988, plaintiffs are entitled to recover from the counsel defendants their actual damages, attorneys' fees, and costs in an amount to be determined at trial.

COUNT IV

Against All Defendants For Common Law Fraud

127. Paragraph 1 through 126 are incorporated by reference herein as if they fully were alleged herein.

128. Defendants made deceptive, materially misleading, and false statements, and omitted to state material facts, as more fully described above, knowingly, willfully, and with the intent to defraud plaintiffs.

129. Plaintiffs justifiably relied upon the deceptive, materially misleading, and false statements and omissions made by defendants.

130. As a result of their justifiable reliance upon the representations made to them by defendants, plaintiffs have suffered monetary injury in an amount to be determined at trial.

131. By reason of defendants' fraudulent conduct, plaintiffs are entitled to recover from defendants all damages proximately caused by defendants' fraudulent conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT V

Against All Defendants for Common Law Fraudulent Concealment

132. Paragraph 1 through 131 are incorporated by reference herein as if they fully were alleged herein.

133. Defendants made deceptive, materially misleading, and false statements, and omitted to state material facts, as more fully described above, knowingly, willfully, and with the intent to conceal from plaintiffs material facts regarding the proposed settlement of the *Hoffman* Action.

134. In their capacity as class counsel in the *Hoffman* Action, the counsel defendants owed plaintiffs a duty to disclose all material facts. The counsel defendants breached this duty in order to maximize the attorneys' fees that they would receive.

135. In their capacity as fiduciaries, the bank defendants were obligated to disclose to plaintiffs all material facts and to protect their customers' escrow accounts from being unlawfully depleted. The bank defendants breached this duty in order to ensure that Bank of Boston and BancBoston would not have to pay the attorneys' fees themselves.

136. As a result of defendants' fraudulent concealment of material facts, plaintiffs suffered monetary injury in an amount to be determined at trial.

137. Plaintiffs are entitled to recover from defendants all damages proximately caused by defendants' conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT VI

Against All Defendants for Negligent Misrepresentation

138. Paragraphs 1 through 137 are incorporated by reference herein as if they fully were alleged herein.

139. Defendants negligently made materially misleading, deceptive, and false statements, and omitted to state material facts, as more fully described above.

140. Plaintiffs justifiably relief upon the materially misleading and false statements and omissions made by defendants.

141. As a result of their justifiable reliance upon the representations made to them by defendants, plaintiffs have suffered monetary injury in an amount to be determined at trial.

142. By reasons of defendants' negligent conduct, plaintiffs are entitled to recover from defendants all damages proximately caused by defendants' negligent conduct, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT VII

Against Defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 for Attorney Malpractice

143. Paragraphs 1 through 142 are incorporated by reference herein as if they fully were alleged herein.

144. As counsel for the *Hoffman* class, the counsel defendants were under a duty to exercise that level of care and diligence that other similarly situated legal service providers ordinarily would exercise in order to protect the rights and interests of the class members.

145. Through their conduct in the *Hoffman* Action, the counsel defendants breached the standard of care that they owed to plaintiffs and committed professional malpractice.

146. By charging excessive, exorbitant, and unwarranted attorneys' fees through fraud, deception, and negligence, the counsel defendants breached the standard of care that they owed to plaintiffs and committed professional malpractice.

147. As a result of the counsel defendant's wanton breach of the standard of care owed to plaintiffs, plaintiffs suffered monetary injury and are entitled to recover from the counsel defendants all damages proximately caused by

defendants' conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT VIII

Against Defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 for Breach of Fiduciary Duty

148. Paragraphs 1 through 147 are incorporated by reference herein as if they fully were alleged herein.

149. As counsel for the *Hoffman* class, the counsel defendants owed a fiduciary duty to their clients.

150. Through their conduct in the *Hoffman* Action, the counsel defendants breached the fiduciary duty that they owed to their clients.

151. By charging excessive, exorbitant, and unwarranted attorneys' fees through fraud, deception, and negligence, the counsel defendants breached the fiduciary duty that they owed to plaintiffs.

152. As a result of the counsel defendants' wanton breach of their fiduciary duty, plaintiffs suffered monetary injury and are entitled to recover from the counsel defendants all damages proximately caused by defendants' conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT IX

Against Defendants Bank of Boston Corporation and BancBoston Mortgage Corporation for Conversion

153. Paragraphs 1 through 152 are incorporated by reference herein as if they fully were alleged herein.

154. As set forth more fully in paragraphs 88 through 107 of this Complaint, defendants Bank of Boston and BancBoston participated with the other defendants in a scheme and artifice to defraud the members of the *Hoffman* class.

155. Having fraudulently obtained the Court's approval of the settlement, defendants Bank of Boston and BancBoston deducted from the accounts of each of their current mortgage holders 5.32% of the escrow account of each such account in order to pay attorneys' fees to the counsel defendants.

156. The deduction of such funds from the escrow accounts of their mortgage holders constituted an improper use of those escrow funds by Bank of Boston and BancBoston.

157. As a result of the scheme devised and implemented by defendants Bank of Boston and BancBoston and the resultant improper use of the escrow funds by Bank of Boston and BancBoston, plaintiffs have suffered a monetary injury and are entitled to recover from the bank defendants all

damages proximately caused by defendants' conduct, exemplary damages, interest, costs, and attorney's fees in an amount to be determined at trial.

COUNT X

Against Defendants Bank of Boston Corporation and BancBoston Mortgage Corporation for Breach of Fiduciary Duty

158. Paragraph 1 through 157 are incorporated by reference herein as if they fully were alleged herein.

159. Defendants Bank of Boston and BancBoston owed plaintiffs a fiduciary duty to safeguard their escrow funds, and to see to it that those escrow funds were used only in strict compliance with the terms and conditions of the escrow agreement into which they entered with plaintiffs.

160. Having fraudulently obtained the Court's approval of the settlement, defendants Bank of Boston and BancBoston deducted from the accounts of each of its current mortgage holders 5.32% of the escrow balance for each such account in order to pay attorneys' fees to the counsel defendants.

161. The deduction of such funds from the escrow accounts of their mortgage holders constituted an improper use of those escrow funds by Bank of Boston and BancBoston.

162. Through their conduct in the *Hoffman* Action, Bank of Boston and BancBoston intentionally and recklessly disregarded plaintiffs' rights.

163. As a result of Bank of Boston and BancBoston's breach of their fiduciary duty to plaintiffs, plaintiffs and other members of the *Hoffman* class have suffered monetary injury and are entitled to recover from defendants Bank of Boston and BancBoston all damages proximately caused by those defendants' conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand a trial by jury and demand judgment against defendants as follows:

1. For certification of a class of plaintiffs as defined above, for designation of this suit as a class action, and for such relief and orders as are necessary to prosecute this action as class litigation.

2. As to the claims set forth in Count I and Count II:

(a) For three-fold the damages sustained by plaintiffs and other members of the class;

(b) For costs of suit, interest, and reasonable attorneys' fees; and

(c) For such further relief as the Court deems just.

3. As to the claims set forth in Count III and Count VI:

(a) For the damages sustained by plaintiff and other members of the class;

(b) For costs of suit, interest, and reasonable attorneys' fees; and

(c) For such further relief as the Court deems just.

4. As to the claims set forth in Count IV, Count V, Count VI, Count VII, Count VIII and Count IX:

(a) For the damages sustained by plaintiffs;

(b) For exemplary damages;

(c) For costs of suit, interest, and reasonable attorneys' fees; and

(d) For such further relief as the Court deems just.

/s/ Anne G. Kimball
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Dated: November 2, 1995

NOT FOR PUBLICATION

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CARL F. HOFFMAN and DEBORAH L. HOFFMAN, Plaintiffs, v. BANCBOSTON MORTGAGE CORPORATION and BANK OF BOSTON CORPORATION, Defendants, v. DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ and MARTHA E. PRESTON, Respondents.	No. CV-91-1880 January 30, 1996

KITTRELL, Circuit Court Judge.

ORDER

A. Procedural Background

On January 24, 1994, this Court entered an Order of Settlement Approval and Final Judgment in this action (the

"Order of Settlement"). This Court retained jurisdiction of this action for the purpose of issuing any and all orders or decrees as may be necessary to effectuate, clarify, modify, or enforce the purpose, intent and terms of the Consent Decree. Even apart from this express reservation of jurisdiction, by operation of law, a Circuit Court retains jurisdiction of a matter to issue such orders as necessary to effectuate its judgments. *Mayhan v. Mayhan*, 395 So. 2d 1022 (Ala. Civ. App. 1981).

On November 2, 1995, Dexter J Kamilewicz, Gretchen L. Kamilewicz, and Martha Preston ("Respondents") filed a complaint (CV-95-C 6341) in the United States District Court for the Northern District of Illinois Eastern Division (the "Federal Class Action"). The Federal Class Action essentially alleged that the defendants in this action (the *Hoffman* case)—BancBoston Mortgage Corporation and Bank of Boston Corporation (hereinafter collectively "BancBoston") along with their counsel Burr & Forman, and T. Thomas Cottingham (hereinafter collectively "Bank Counsel")—conspired with class counsel to defraud the Court as to the "economic benefit" conferred upon the class by the settlement so that class counsel could recover enormously excessive fees. The Federal Class Action sought to certify as a class all those who had been class members in the *Hoffman* case. Respondents filed their action in federal court notwithstanding this Court's express reservation of jurisdiction. (Consent Decree, paragraph 20).

On November 22, 1995, class counsel in the *Hoffman* case (who were also defendants in the Federal Class Action) filed a motion seeking an order directing Respondents to come forward and show cause why they are not bound by the Order of Settlement which approved the class action settlement in the *Hoffman* case and awarded attorneys' fees to class counsel. On December 4, 1995, this Court granted class counsel's motion and ordered Respondents to appear on December 18, 1995. On December 15, 1995, United States District Judge Paul Plunkett dismissed the Federal Class Action, holding that he lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine. On December 18, 1995, this Court held a hearing on the show cause motion. Class counsel for the Bank of Boston appeared. Charles H. Hillman, Esq. appeared at the hearing and stated, that, while he was not making an "appearance" on their behalf, the Respondents would not be present at the hearing.

B. Statement of the Case

This case was commenced in May of 1991 when Carl and Deborah Hoffman filed a class action complaint in this court alleging, *inter alia*, that the Bank of Boston and its wholly owned subsidiary, BancBoston Mortgage Corporation, required mortgagors to deposit excessive sums in their mortgage escrow accounts.

The Bank of Boston and BancBoston Mortgage Corporation were represented in this case by Burr & Forman, a Birmingham, Alabama law firm and T. Thomas Cottingham

of that firm. The Hoffmans and the class were represented by the Mobile law firm of Ezell & Sharbrough, L.L.C. and Mark Ezell, John W. Sharbrough, III, Sarah H. Stewart of that firm, Daniel A. Edelman, of Edelman & Combs of Chicago, Illinois, and Lawrence Walner of Lawrence Walner and Associates, also of Chicago, Illinois.

Following various pretrial motions and rulings of this Court, the parties presented a proposed consent decree to the court setting forth a nationwide class settlement of this matter. On December 6, 1993, pursuant to Rule 23 of the Alabama Rules of Civil Procedure, this Court entered its order preliminarily approving the terms of the settlement and directing that the court approved notice be mailed to each class member. On November 24, 1993, the Attorney General of Florida filed a motion to intervene in this matter for the purpose of objecting to the proposed settlement and attorney's fees. That motion was granted, over the objection of class counsel.

A Fairness Hearing was held, after notice to the class, on January 10 and 11, 1994. During the Fairness Hearing, this Court engaged in a judicial inquiry to determine the fairness of the proposed settlement and the amount, if any, to be awarded to class counsel as attorneys' fees. After hearing the evidence and arguments of counsel, including evidence and vigorous arguments of the Florida Attorney General who intervened to represent absent class members, and the report of Therese Green, Esq., the special master appointed to review

the settlement, this Court entered a Consent Decree and an Order of Settlement Approval and Final Judgment on January 24, 1994. In the Order of Settlement, the Court awarded class counsel attorney's fees based on the economic benefit to the class. Thereafter, the settlement was implemented. Class counsel has continued to monitor the settlement and assist class members with their questions and concerns.

On or about March 9, 1995, Dexter J. Kamilewicz wrote this Court expressing his dissatisfaction with the proceedings in this case. Mr. Kamilewicz sent copies of that letter to a number of person [sic] including members of congress and the governor of Maine. He complained generally about the Court's decision approving the settlement and specifically that class counsel would "profit" from the case. He did not set forth, however, any evidence, knowledge or information of fraudulent conduct by any of the parties or attorneys in this litigation. The Court referred Mr. Kamilewicz's letter to John W. Sharbrough, III, Esq., and directed Mr. Sharbrough to answer Mr. Kamilewicz's letter and report back to the Court. On April 17, 1995, Mr. Sharbrough wrote to the Court and explained that Maine Senator William Cohen's office had also contacted him regarding Mr. Kamilewicz. Mr. Sharbrough further explained that he had requested more information from Mr. Kamilewicz but had not received a reply. Additionally, Mr. Cottingham of Burr & Forman wrote Mr. Kamilewicz a lengthy letter

explaining the settlement and addressing Mr. Kamilewicz's concerns. The Federal Action was then filed by Respondents.

C. The Hearing

This matter came before the Court in a hearing held on December 18, 1995. The purpose of this hearing was two fold. The first purpose was to hear the issues raised by class counsels' motion for order to show cause. Second, this Court treated Respondents federal court allegations as an independent action under Alabama Rule of Civil Procedure 60(b) to set aside the Order of Settlement. Respondents and their counsel in the Federal Class Action failed to appear before this Court at the hearing as ordered. This Court notes that there can be no question that Respondents and their counsel had actual notice of the hearing. Respondents filed a motion for a temporary restraining order in the Federal Class Action seeking to enjoin this Court from holding a hearing. Additionally, Respondents and their counsel sent Mr. Hillman to the hearing for the limited purpose of informing the Court that they would not be appearing and that they contest this Court's personal jurisdiction over Respondents. The case action summary also reflects that Notice of the hearing was served on the Respondents by certified mail prior to the date of the hearing.

As discussed below, this Court does have personal jurisdiction over the Respondents, and Respondents have stated no other reason for their failure to appear. By their own allegations in the Federal Class Action, Respondents Dexter J.

Kamilewicz and Gretchen L. Kamilewicz live in Maine while Respondent Martha Preston lives in Wisconsin. Thus, Respondents only connection with the State of Illinois appears to be the fact that some of Respondents' counsel reside there. Undeniably, the nexus with Alabama, the forum for the original action, is stronger and, if Respondents have the resources to pursue an action in Illinois, it is reasonable to conclude that they have the resources to appear for a hearing in Alabama. This Court's Order of December 4, 1995 specifically provides that Respondents would be "given the opportunity to present evidence and testimony in support of their allegations." In dismissing the Federal Class Action, Judge Plunkett also believed that this Court is the proper forum for Respondents to raise their claims. Judge Plunkett stated that Respondents' claim to the contrary "makes little sense." (Federal Class Action Order dated December 15, 1995 at p. 14).

D. Respondents' Contentions

1. Lack of Jurisdiction

Respondents have asserted that this Court does not have personal jurisdiction over them. "A forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant so long as the forum state provides minimal procedural due process protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1983).

Shutts defines this due process as requiring 1) that the plaintiff receive the best practicable notice of the pendency of the action; 2) that the plaintiff be provided an opportunity to be heard; 3) that the plaintiff be provided an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form; and, 4) adequate representation by the named plaintiff. *Id.* at 806-14. Alabama courts have followed *Shutts* and held that res judicata prevents relitigating claims by absent class members if an opt out form is provided. *See Martin v. Drummond Company, Inc.*, 1995 WL 396879 (Ala. 1995). Having reviewed the *Shutts* jurisdictional requirements, the Court holds that they have been satisfied in this case.[1] Respondents' claims that this Court lacks jurisdiction over them are meritless.[2]

2. Fraud on the Court in Prior Proceedings

This Court provided Respondents with an opportunity to present evidence in support of their claims raised in the

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[1] The Court notes that it has addressed the jurisdiction issue on two prior occasions. On December 6, 1993 this Court gave preliminary approval to the notice as to content and as to manner of service and publication. On January 24, 1994, this Court gave final approval to the notice and specifically held that due process had been satisfied. (Order of Settlement at ¶ A).

[2] Though not specifically addressed in Judge Plunkett's order, the holding that this Court had personal jurisdiction over Respondents was implicit in his ruling dismissing the case which in effect left this Court as the remaining available forum.

Federal Class Action. Respondents bore the burden of proving their allegations but have refused the opportunity and leave the Court with no option other than to reexamine the evidence presented at the Fairness Hearing as well as the pleading filed in the *Hoffman* case and the proceedings prior to the Fairness Hearing. Having freshly reviewed that evidence, those pleadings, and the prior proceedings, this Court finds no evidence of fraud on this Court as alleged by Respondents. Additionally, this Court finds that the substance of Respondents arguments concerning "economic benefit" and the possible "net loss" to some class members was raised, argued and briefed by the Florida Attorney General's office. Therefore, these arguments have already been fully adjudicated and decided by this Court.

Class counsel adequately represented the class throughout this litigation and at the Fairness Hearing. The interests of the absent class members, in so far as it conflicted with class counsel's fee request was zealously represented by the Attorney General of California (who had filed a similar action against the defendants and was familiar with the subject matter of the case). Other than the personal appearance of each class member (over 400,000 persons), nothing more could have been done to protect the interest of the Respondents or the class. The Order of Settlement is reapproved in its entirety. Respondents are bound by the

terms of the Order of Settlement and are precluded from raising the claims set forth in the Federal Class Action.[3]

Having found that there was no fraud on the Court perpetrated by any of the defendants in the Federal Class Action, this Court also holds that Respondents' claims against BancBoston and Bank Counsel fail for, at least, four other reasons: 1) BancBoston and Bank Counsel owed no duty to Respondents to protect them from alleged overreaching by their own counsel; 2) BancBoston and Bank Counsel lacked standing to object to the payment of attorneys' fees; 3) BancBoston and Bank Counsel did not make any affirmative representations concerning the reasonableness of the attorneys' fees awarded to class counsel or as to the definition of "economic benefit"; and 4) BancBoston and Bank Counsel have been released from the claims asserted by Respondents and Respondents have failed to tender the benefits of that release.

The fiduciary duties of an escrow agent are limited to those which they have assumed under the escrow contract.

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[3] In addition, this Court holds that the class received a benefit under the settlement even if class counsels' definition of "economic benefit" were wrong. For example, it is unquestioned that the accounting method used to determine escrow balances was changed to a system that, on average, requires lower balances. Other benefits to the class are set forth in Order of Settlement. Thus, even if *Shutts* can be read as requiring a benefit to the class as a requirement of jurisdiction, the class unquestionably received a benefit.

Gurley v. Bank of Huntsville, 349 So.2d 43, 45-6 (Ala. 1977). BancBoston and Bank Counsel assumed no duty to protect class members from the very attorneys who sued BancBoston on their behalf. "[I]n a class action suit, where a lump sum settlement has been negotiated and attorney fees have been awarded from the fund, the defendant ordinarily has no standing to object to the fee award because it no longer has an interest in the fund." *Sampson v. Eastman Kodak Company*, 552 N.E.2d 1194, 1198 (Ill.App.Ct. 1990). [*See also*, *Boeing Co. v. Van Gernert*, 444 U.S. 472 (1980); *Florin v. Nationsbank*, 34 F.3d 560, 562 (7th Cir. 1994); *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980); *In Re Unisys Corp. Retiree Med. Bene. ERISA Lit.*, 886 F.Supp. 445, 455 (E.D.Pa. 1995)]. This Court has reviewed the pleadings filed in the *Hoffman* case, the proceedings prior to the fairness hearing and the transcript of the fairness hearing and has found no affirmative representations by BancBoston or Bank Counsel as to the reasonableness of the claimed attorneys' fees or as to the definition of the "economic benefit" of the settlement to the class members. The Consent Decree approved by this Court contained a detailed release of claims against BancBoston and Bank Counsel. This Court has examined the claims asserted in the Federal Class Action against BancBoston and Bank Counsel and those claims fall within the purview of the release. If a party attempts to set aside a release by claiming that he was induced to sign it through fraud, and he has received a benefit from the release, he must tender the benefit when he attempts to set aside the release. Respondents have made no such tender.

CONCLUSION

Having reviewed all evidence available to this Court including all pleadings filed in the *Hoffman* case, the proceedings prior to the fairness hearing, and the transcript of the fairness hearing, this Court finds that Respondents [sic] allegations of misrepresentation and fraud on the court are baseless. *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 647 (N.D. Cal. 1978) *aff'd and adopted by* 645 F.2d 699 (9th Cir. 1981) involved a fact pattern substantially similar to the present situation. As stated by the *Valerio* court:

> In substance, if not in form, the gravamen of plaintiffs' lawsuit is that the [former class action] settlement was inadequate. There perhaps are many who, with the benefit of hindsight, might well agree with that position. In 1973, however, we were satisfied not only with the adequacy of the representation and notice given the class but also with the adequacy of the settlement. The plaintiffs could have challenged our conclusion in the Ninth Circuit Court of Appeal. They chose not to do so. *They cannot now relitigate that issue behind a rhetorical smokescreen of fraud and conspiracy.*

Valerio, 80 F.R.D. at 658 (emphasis added).

Having treated Respondents' allegations as an "independent action under Alabama Rule of Civil Procedure 60(b)" to set aside the judgment, this Court holds that that action fails, and the Order of Settlement is reapproved in its entirety. Respondents are bound by the Order of Settlement and are precluded from reasserting the claims dismissed in the Federal Class Action in any forum.

/s/ Braxton L. Kittrell, Jr.
Braxton L. Kittrell, Jr.
Circuit Court Judge

IN THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

No. 95-55306

DAVID D. BENNETT, et al.,

Plaintiffs-Appellants,

v.

GEN-PROBE, INCORPORATED,
THOMAS H. BOLOGNA, et al.,

Defendants,

and

LAW FIRM OF JONES, WALDO,
HOLBROOK & McDONOUGH,

Appellee.

Appeal From The United States
District Court For The Southern District
Of California.
D.C. No. CV-90-01183
Judith N. Keep, *District Judge*

ARGUED April 10, 1996 - DECIDED June 14, 1996

JUDGES: Before: SCHROEDER, LEAVY, Circuit Judges and TRIMBLE[1] District Court Judge.

OPINION: MEMORANDUM[2]

Plaintiff-appellant, David D. Bennett is a former named plaintiff in Bennett v. Bologna, a securities fraud class action that was settled after Bennett opted out. Bennett appeals the district court's issuance of a permanent bar order obtained by counsel for the plaintiff class.

The class counsel who obtained the bar order argue initially on appeal that this court lacks jurisdiction to review the bar order because Bennett did not file a timely notice of appeal. *Brownier v. Director,* 434 U.S. 257, 264, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978) (timely notice of appeal both mandatory and jurisdictional). Bennett's notice of appeal was, however, timely filed with respect to the district court's denial of Bennett's motion, argued pursuant to Federal Rules of Civil Procedure 59(e) and 60, "to set aside order, and alternatively, . . . to alter or amend order." Because the district court's

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[1] Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

denial of Bennett's motion addresses the merits of Bennett's arguments, this court reaches the merits of Bennett's appeal.

On the merits of his appeal, Bennett contends that since no federal court has jurisdiction to hear the underlying state malpractice and breach of contract claims he is seeking to litigate in Utah, the district court lacked subject matter jurisdiction to enter the bar order. The district court has jurisdiction, however, to enter orders to preserve and protect the "fruits and advantages" of its judgment. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 239, 78 L. Ed. 1230, 54 S. Ct. 695 (1934); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983) ("[a] district court retains jurisdiction to enforce the judgments it enters" and may reinforce res judicata or collateral estoppel via injunction). Thus, the district court had jurisdiction to enter a bar order to protect the finality of its class action judgment. The issue is whether this bar order serves such a purpose. The district court may not prevent a Utah court from litigating malpractice and breach of contract issues relating to appellee law firm's representation of Bennett, because such litigation does not endanger or affect the "fruits and advantages" of the district court's judgment settling the underlying class action. Further, in adjudicating Bennett's malpractice and breach of contract claims, a Utah court may examine the adequacy of the class settlement, but only insofar as that settlement sheds light on

appellee law firm's representation of Bennett. The district court was entitled to protect the district court's own judgment, and thereby ensure its finality so that the class members would still receive the same settlement; the class defendant would remain obligated to pay the same settlement, and Bennett would remain a non party with no right to any share of that settlement. *Cf. Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.*, 542 F.2d 45, 48 (9th Cir. 1976) (injunction proper where state action, if successful, would nullify the federal bankruptcy court's order of distribution).

The bar order contains a disclaimer that it does not "restrain David D. Bennett from pursuing solely his individual claims . . . ." This should not be construed to limit Bennett to pursuit of his individual claims against the original class action defendant and to preclude any challenge to counsel's handling of the class action. The district court's order must be construed narrowly to prevent any collateral attack upon the class action judgment and its finality as between the parties to that judgment. We hold, however, that the bar order cannot be construed to prevent Bennett from litigating issues in his malpractice and breach of contract actions that relate to class counsels' handling of the class action, so long as such litigation does not undermine the finality of class action judgment. The order, as so construed, is therefore AFFIRMED.

Any further appellate proceedings in this matter, including any appeals from a contempt order, shall be referred to this panel.

No. 96-1184

Supreme Court, U.S.
FILED
MAR 27 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May petitioners, who are former members of the plaintiff class in an earlier state action and who purport to represent substantially the same class membership in the instant case, evade the *Rooker-Feldman* jurisdictional doctrine and collaterally attack the state court's fact-intensive determination of fair fees for class counsel by asserting that notice of the fairness hearing upon a proposed class settlement and class counsel's fee petition violated due process, notwithstanding:

— that the state court adjudicated the question of its jurisdiction, finding that the notice complied with due process and that the court had jurisdiction over class members;

and

— that the allegedly deficient notice was, in fact, sufficient to prompt members of petitioners' class to prevail upon the Florida Attorney General to intervene on their behalf in the state proceedings and actively litigate the issue of reasonable fees;

and

— that those intervening class members successfully prevailed upon the state court to award lower fees than those sought by counsel;

and

— that those intervening class members then elected not to appeal that state court ruling.

PARTIES TO THE PROCEEDINGS

Petitioners (plaintiffs below): Dexter J. Kamilewicz, Gretchen L. Kamilewicz, and Martha E. Preston, on behalf of themselves and all others similarly situated.

Respondents (defendants below): Bank of Boston Corporation and BancBoston Mortgage Corporation were named defendants in the earlier state class action which is the subject of this litigation. Bank of Boston Corporation has no parent company and has the following non-wholly owned subsidiaries: Boston Equiserve, Thor Credit Corporation, and HomeSide, Inc. The parent company of BancBoston Mortgage Company is HomeSide, Inc. BancBoston Mortgage Company is now known as HomeSide Lending, Inc., and it has no non-wholly owned subsidiaries.

Burr & Forman and specifically T. Thomas Cottingham, represented the banks in the state action.

Ezell & Sharbrough, Mark Ezell, and John W. Sharbrough, III were the principal attorneys for the plaintiff class in the state action. They are not, however, before this Court as petitioners did not effect service of process upon them.

Edelman & Combs; Daniel A. Edelman; Lawrence Walner & Associates; Lawrence Walner were additional counsel for the plaintiff class.

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OPINIONS BELOW

The District Court's opinion is not published. It is instead available from online services at *Kamilewicz v. Bank of Boston Corp.*, No. 95 C 6341, 1995 U.S. Dist. LEXIS 18973 (N.D. Ill. Dec. 15, 1995), or *Kamilewicz v. Bank of Boston Corp.*, No. 95 C 6341, 1995 WL 758422 (N.D. Ill. Dec. 15, 1995). The Court of Appeals' opinion is reported at *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996). The dissent from the Court of Appeals' denial of rehearing and suggestion for rehearing *en banc* is reported at *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996).

STATEMENT OF JURISDICTION

The District Court's judgment was entered on December 15, 1995. The Court of Appeals' judgment was entered on August 8, 1996. Plaintiffs' petition for rehearing was denied on November 22, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

> out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 1, of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Full Faith and Credit Act, 28 U.S.C. § 1738, provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

COUNTER-STATEMENT OF THE CASE

An Embarrassment Petitioners Would Wish Away

Petitioners' statement of the case is inaccurate and incomplete in several material respects. Most notably, petitioners have not disclosed the critical role played by the Florida Attorney General. The Florida Attorney General has proven to be such an embarrassment to petitioners that they have apparently taken the drastic step of terminating his role as their *amicus*.[1] Petitioners claim to be representatives of the former members of the plaintiff class in an earlier state class action[2] (hereinafter *Hoffman).* (Pet. App. 59, 65) In fact, a significant contingent of petitioners' putative class (the Florida members of the plaintiff class), acting through the Florida Attorney General, had intervened in *Hoffman* and actively litigated the very questions (the value of the settlement and a fair fee award for class counsel) petitioners now seek to have the federal court review in violation of the *Rooker-Feldman* jurisdictional doctrine.

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[1] The Florida Attorney General served as *amicus curiae* supporting petitioners before the Seventh Circuit.

[2] The class action was filed in Alabama where the named plaintiffs and a large percentage of the plaintiff class resided. BancBoston Mortgage Company was located in Northern Florida and was primarily a regional servicer. The case was filed in Mobile County under the style and caption of Hoffman, et al. v. BancBoston Mortgage Corp., No. CV-91-1880.

A Claim Inextricably Intertwined With Earlier State Proceedings

Petitioners vaguely assert that respondents somehow perpetrated a fraud upon the *Hoffman* court and that, as a consequence, that court's award of fees to class counsel unfairly exceeded one-third of the economic benefit of the class settlement. (Pet. App. 52-53)

The *Hoffman* court, which had earlier certified the class pursuant to Alabama Civil Procedure Rule 23(b)(2)[3] and granted the plaintiff class partial summary judgment, conducted a fairness hearing on January 10 and 11, 1994, and by order entered January 24, 1994,[4] approved the proposed settlement of the class action, rejected class counsel's request in their fee petition for a fee equivalent to one-third of the economic benefit of the settlement and awarded fees, which it specifically determined to be less than one-third of that benefit.

The Value Of The Class Settlement

The class settlement required the defendant, BancBoston, to stop overcharging its mortgagors the amounts required to be paid into and retained in their escrow accounts, refund the excess already in those accounts (19% of the amount held in escrow) and pay the mortgagors interest on the sums which had been wrongfully held. (Resp. App. 10-11) The court considered tes-

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[3] Alabama Rule 23 is identical to Federal Rule 23.

[4] Petitioners did not provide this Court with the *Hoffman* decision of 1/24/94, which decided the very question now resurrected by this lawsuit. That order is set forth in Respondents' Appendix 4-18.

timony, including that of experts, and documentary evidence adduced upon the two-day fairness hearing and entered its order of January 24, 1994, identifying several categories of economic and non-economic benefit, both present and future. The court determined that that benefit included the time value of the money which, but for the settlement, would not have been refunded until the mortgages ended and the money which, again, but for the settlement, would have been paid into escrow *in futuro*.

The court further decided that the fee determination should be based upon that economic benefit:

> In this case, because of the broad responsibilities and risks assumed by class counsel, and the unprecedented results achieved by Class counsel, Class counsel's efforts merit a fee based upon a percentage of the economic benefit conferred by this settlement. The total fee recovery as set out below is found to be reasonable in light of the fact that the future benefit conferred upon the Class by this Consent Decree is substantial and is at least as valuable to the Class as the immediate refund to the Class of the settlement proceeds from the common fund. This Court makes this determination after taking into . . . account the objections of the Florida Attorney General. (Resp. App.16-17)

The Court further determined the minimum value of the economic benefit and that the fees should be 28% of that sum—and not the one-third sought by class counsel. The fees thus calculated and awarded approximated $8.5 million (not $14 million as asserted by petitioners) and that included both fees to be allocated among all of the several class counsel and costs.

Petitioners' Federal Claim:
A Denial Of the Time Value Of Money

Petitioners' challenge to the fairness of the fees is based on their denial of the time value of money, asserting that the only benefit to members of the plaintiff class was the interest which the defendant in *Hoffman* was required to pay to class members. (Pet. App. 52 and 53) The district court below, Judge Plunkett presiding, identified the gist of petitioners' claim as one inextricably intertwined with the very question decided by the *Hoffman* court:

> The plaintiffs here allege that the true economic benefit to the plaintiff class in the *Hoffman* litigation was only the interest payment. . . . (Pet. App. 21, 31)

The district court dismissed this action, pursuant to Fed. R. Civ. P 12(b)(1) for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine,[5] stating:

> [T]he plaintiffs are asking us to undo what the Alabama court did, and that constitutes a [sic] impermissible collateral attack upon the state court judgment . . . we would have to re-open, in effect, the Alabama court's decision regarding the economic benefit to the class and the reasonableness of the award of attorneys' fees. (Pet. App. 31)

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[5] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Petitioners' Belated Attack Upon The Jurisdiction Of The *Hoffman* Court

The focus of petitioners' argument before this Court—their challenge to the *Hoffman* court's jurisdiction over the members of the plaintiff class—is an afterthought not pled in their complaint. (Pet. App. 49-105) Petitioners first raised the assertion in response to and in an effort to evade respondents' *Rooker-Feldman* defense. Nevertheless, petitioners have repeatedly insisted that they do not "seek to overturn the Alabama judgment." (Pet. Opening Brf. before 7th Cir. at 4) Thus, the Court of Appeals described petitioners' contradictory attack upon jurisdiction as "shifting sand." (Pet. App. 6)

Also, notice[6] to class members, effected both by first class mail and publication, advised them in neutral terms of the nature of the lawsuit; the proceedings to date; the general terms of the proposed settlement; that only "some" class members would receive a payment of interest or a cash refund; that others would receive a credit; that fees, if awarded, would "be paid out of each

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[6] Although petitioners attack the notice, they did not place it in the record. That notice is a matter of record in the *Hoffman* case. Also, it was published in *USA Today* on December 13 and 20, 1993. A federal court may take judicial notice of the records of an inferior court in other cases. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). Also, since items published in newspapers are "capable of accurate and ready determination" such items may be the subject of judicial notice. *Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1356 (3rd Cir.) *cert. denied*, 115 S.Ct. 62 (1994); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995); *Wilson v. Schwarz*, 99 F.3d 1141(6th Cir. 1996). Pertinent portions of the notice are set forth in respondents' appendix (Resp. App 1-3).

escrow account"; the availability upon request of more detailed information; the hearing date; the subject ("whether" the proposed settlement is "fair, reasonable and adequate" and whether class counsel should be awarded fees and if so, the amount thereof) and the right of class members to appear and object or opt out. The notice, the content of which was prescribed by the *Hoffman* court (Pet. App. 70), described class counsel's fee petition as follows:

> Class Counsel will request the Court to award them a reasonable attorney fee to be paid out of each escrow account based upon the benefit conferred on the class . . . Class Counsel has indicated that they will request a percentage not to exceed one-third of the economic benefit conferred on the class as a result of this settlement. The Court will decide whether or not to award attorneys' fees to class counsel at the fairness hearing scheduled for January 10, 1994. (Resp. App. 2-3)

Petitioner, Martha Preston, admitted that she personally received the notice. (Doc.37, Aff. of Martha E. Preston)[7]

The *Hoffman* Court's Adjudication Of Its Jurisdiction

The *Hoffman* court initially approved the class notice on December 6, 1993 (Doc.22, Exh. A, p.3), thereafter heard evidence on the reasonableness of notice and, by order of January 24, 1994, specifically held that both the personal notice and notice by publication complied with

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[7] All citations to a "Doc." number are citations to the Record on Appeal before the Seventh Circuit.

due process requirements, giving the members of the plaintiff class ample opportunity to object to both the proposed settlement and fees. (Resp. App. 15-16) The Court's order states:

> The notice given to members of the Class by publication and by mail . . . complied with all requirements of due process, all requirements of Rule 23 of the Alabama Rules of Civil Procedure, and constituted the best notice practicable under the circumstances. (Resp. App. 15)

The Sufficiency Of The Notice

In their argument before the Court of Appeals, petitioners asserted that the notice approved and effected in *Hoffman* gave them "no opportunity to raise their claims in the state action." (Pet. Opening Brf. before 7th Cir. at 24) In fact, the Florida Attorney General intervened in *Hoffman* at the behest of and on behalf of Florida members of the class who had received that notice. (Doc. 39, Exhs. A & B)

Petitioners' Representation That Their Arguments Challenging Fairness Were Not Made In *Hoffman*

In support of their accusation of fraud, petitioners made the following representation to the Court of Appeals:

> [A]t no time during the fairness hearing was . . . the fact that most, if not all, of the *Hoffman* class members would suffer a net out-of-pocket loss even mentioned. . . much less raised, argued, briefed or decided. (Pet. Reply Brief before 7th Cir. at 10)

In fact, the Florida Attorney General made that very argument in *Hoffman*. In a brief which he filed in *Hoffman*, "in opposition to approval of . . . class counsel's fee request," the Florida Attorney General argued that "the benefit to class members has been overstated" (Doc. 39, Exh. B at 8) because payment should be determined by the interest which was to be paid by BancBoston and not upon consideration of the future value of money. Also, in his cross-examination of a witness, the Florida Attorney General specifically asked about the possibility "that somebody could end up with less money after this settlement in their escrow account than they did before[.]" (Doc. 39, Exh. A at 77)

The Florida Attorney General's Admission: The Benefit To The Class Was At Least $32 Million

In *Hoffman*, the Florida Attorney General argued that the court should reject the evidence adduced upon the two day fairness hearing that the economic benefit to the class members exceeded $42 million. The Florida Attorney General argued that the economic benefit instead approximated $32 million. (Doc. 39, Exh. B at 2, 3, 13, 14, 18)

The *Hoffman* Court's Decision Upon The Supplemental Proceedings: No Fraud

At the time their motion to dismiss this action was pending below, those respondents who were counsel for the plaintiff class in *Hoffman* filed a motion before the *Hoffman* court asking that court to direct petitioners to

show cause why they should not be bound by that court's adjudication of January 24, 1994. The court treated plaintiffs' complaint in the instant case as an Alabama Rule 60(b) motion for supplemental relief and scheduled a hearing for December 18, 1995. The *Hoffman* court had, by its order of January 24, 1994, retained jurisdiction, "for the purpose of adducing evidence regarding the fairness, reasonableness and adequacy of the Decree, for the purpose of hearing any objections to the Decree or any provision thereof, and for the purpose of determining the fairness, reasonableness and adequacy of the Decree . . . ." (Resp. App. 22) Also, the court directed counsel to have summons served upon petitioners and directed petitioners to substantiate their accusations. (Doc. 39, Exh. C at 2)

Referencing the scheduled hearing of December 18, 1995 the *Hoffman* court stated:

> The respondents allege that a fraud was perpetrated upon this Court and further that information which was material to these deliberations was withheld by class counsel. Furthermore, Mr. Kamilewicz has contacted this Court regarding this matter.
>
> * * *
>
> [A]t that time they will be given an opportunity to present evidence and testimony in support of their allegation challenging this Court's final order in this matter. (Doc. 39, Exh.C at 1, 2)

In the order below granting respondents' motion to dismiss, the district court made the following comment relative to that scheduled hearing:

> If the defendants did perpetrate a fraud upon the Alabama court, as the plaintiffs have alleged, then the state court was an innocent victim of it; that is

> a far cry from being prejudiced against the plaintiffs . . . Moreover, if the plaintiffs address their concerns to the Alabama court now and can substantiate their claims, that court is likely to be outraged by the defendants' conduct. (Pet. App. 32)

Petitioners, who had received the summons and notice of the December 18 hearing, sent a representative to the *Hoffman* court, stating their refusal to participate. (Pet. App. 111)

The *Hoffman* court nevertheless proceeded to conduct the scheduled hearing and by order entered January 30, 1996 made the following findings:

- that the court has personal jurisdiction over plaintiffs;
- the due process requirements have been satisfied and plaintiffs' claim that the court lacks jurisdiction is meritless;
- that the substance of plaintiffs' arguments concerning the alleged excessiveness of fees was raised, argued and briefed by the Florida Attorney General and was fully adjudicated and decided by the Court;
- that defendants did not perpetrate a fraud upon the court;
- that plaintiffs' allegations of misrepresentation and fraud upon the court are "baseless." (Pet. App. 106-118)

ARGUMENT

PRELIMINARY

THE CASE PETITIONERS DESCRIBE IS NOT THE CASE BEFORE THIS COURT

A Spurious Claim Of Fraud

Petitioners' claim of fraud is hyperbole or, as the district court below described it, mere "dress[ing]". The transcript of the *Hoffman* court's fairness hearing and the Florida Attorney General's brief, both of which are in the record, demonstrate on their face that the Florida Attorney General aggressively participated in the proceedings, that no evidence was withheld and that his participation was unfettered.

Petitioners' federal lawsuit, stripped of this hyperbole, simply asserts that the *Hoffman* court erred in its determination of "what" is the value of the benefits conferred by class counsel. In its opinion below, the district court summarized the point:

> Even though their request for relief is dressed up as damages under RICO, section 1983, or for attorney malpractice, the plaintiffs are asking us to undo what the Alabama court did, and that constitutes a [sic] impermissible collateral attack upon the state court judgment. (Pet. App. 31)

Additionally, members of petitioners' class who intervened in *Hoffman via* the Florida Attorney General participated in litigating the issue of fees. Those litigants had every right to challenge the *Hoffman* court's fairness determination by appealing. Instead, petitioners have opted to repeat those very arguments before the federal court asserting that the only economic benefit resultant

from the settlement was the defendant bank's payment of interest to the mortgagors.

There is only one significant difference between the arguments presented below and those advanced in *Hoffman*. In *Hoffman*, the Florida Attorney General admitted that the future value of money constituted a substantial economic benefit and, further, that the economic benefit approximated $32 million. (Doc. 39, Exh. A, Exh. B at 8-13)

That admission, on its face, makes plain that the fees awarded did not exceed one-third of the economic benefit.

A Contrived Due Process Claim

Petitioners' assertion that they were denied due process is unfounded. The notice of class action and proposed settlement (Resp. App. 1-3) assiduously adhered to the requirements of due process as established by case law.[8] The notice is neutral as to the merits of the assertions of the parties, identifies class counsel's request for fees, states that the fees will be paid out of the escrow accounts, that some class members will not receive an immediate money pay out, and that the amount of fees, if any, is a subject of the scheduled fairness hearing.

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[8] *See e.g.*: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977); *Handschu v. Special Services Div.*, 787 F.2d 828, 832-33 (2d Cir. 1986); *Miller v. Republic Nat. Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977); *In re General Tire and Rubber Co. Securities Litigation*, 726 F.2d 1075, 1086 (6th Cir.), *cert. denied*, 469 U.S. 858 (1984).

Petitioners' Mischaracterization Of The Court of Appeals' Decision

Petitioners' assertion that the Court of Appeals held that *Rooker-Feldman* deprives a federal court of jurisdiction "even if" the state court did not have jurisdiction (Pet. at 13) is ludicrous. It is axiomatic that a judgment is not entitled to full faith and credit if the court rendering the judgment did not have jurisdiction. The Court of Appeals simply and correctly held that the jurisdictional question was resolved by the *Hoffman* court's determination that there was a substantial benefit to the class and that the class notice passed constitutional muster.

Petitioners also wrongly assert that the Court of Appeals held that *Rooker-Feldman* broadly precludes actions for legal malpractice. (Pet. at 26) The Court of Appeals' decision is narrow and limited to the facts of this unique case. *Rooker-Feldman* precludes *this action*, which petitioners loosely—and indeed inaccurately—describe as one for malpractice, only because that claim is inextricably intertwined with the state court's determination that the fees awarded are fair and substantially less than one-third of the economic benefit of the class settlement. Under *Rooker-Feldman* that ruling conclusively establishes that there was no "malpractice" here.

No Precedential Value

Respondents respectfully submit that petitioners' mischaracterizations are designed to mask the fact that this case involves unique circumstances which militate against its value as precedent. The *Hoffman* court provided a safeguard for absent class members by appointing a Special Master to effectively act as their guardian

ad litem and the court specifically referenced and considered that Master's special report in its decision of January 24, 1994. Additionally, this case cannot provide precedent for any class action where, in contrast to the instant case, the class members did not participate in litigating the very issue they now challenge by "appeal" to the Federal District Court.

I.

THE *ROOKER-FELDMAN* DOCTRINE HAS WITHSTOOD THE TEST OF TIME.

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 525 (1931)

The issue of fairness was, contrary to Judge Easterbrook's dissent, specifically litigated in *Hoffman* and that issue, "once tried", should be forever settled. In the order of January 30, 1996, the *Hoffman* court stated:

> [T]he substance of Respondents [sic] arguments concerning "economic benefit" and the possible "net loss" to some class members was raised, argued and briefed by the Florida Attorney General's office. Therefore, these arguments have already been fully adjudicated and decided by this Court. (Pet. App. 114)

Petitioners cannot evade this reality upon their vague and undefined allegations of fraud. "Fraud upon the court," justifying an attack on a judgment, is a limited kind of fraud. It is fraud that "defiles the court itself or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner

its impartial task of adjudging cases that are presented for adjudication." *Kenner v. Commissioner*, 387 F.2d 689, 691 (7th Cir.); *cert. denied*, 393 U.S. 841 (1968). There must be "the most egregious conduct involving a corruption of the judicial process itself," such as bribery of a judge or similar improper influence on the court. Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 2870, pp.418-19 (1995). *See also Browning v. Navarro*, 826 F.2d 335, 344-45 n.12 (5th Cir. 1987). Petitioners have specifically acknowledged that the *Hoffman* court was not a party to and did not participate in any alleged wrongdoing. (Doc.36 at 5 n.5, 13 n.8; Doc.37 at 4)

Additionally, the proper forum in which to assert that a party has perpetrated a "fraud upon the court" is the court which allegedly was the victim of that fraud—the claim cannot be made in another court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 249-50 (1944); *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700, 706 (7th Cir. 1987); *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 808-09 (7th Cir. 1969); Wright, Miller & Kane *supra*, at 411. The *Hoffman* court specifically found, in its order of January 30, 1996, that no evidence had been withheld and that the allegations of fraud are "baseless." (Pet. App. 117)

Petitioners' federal lawsuit, no matter how "dressed up" with allegations of RICO violations, fraud or malpractice, essentially asserts nothing more than that the *Hoffman* court erroneously awarded too large a fee. That, under *Rooker-Feldman*, may not be re-litigated. The *Rooker-Feldman* doctrine is a sound and established principle and there is no reasonable alternative to the conclusion that the facts before this Court require its application. *Johnson v. DeGrandy*, 512 U.S. 997, ___, 114

S. Ct. 2647, 2653-54 (1994); *Howlett by Howlett v. Rose*, 496 U.S. 356, 369, 370 n.16, 372-73 (1990); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989).

The class petitioners seek to represent is the plaintiff class in *Hoffman* and, as such, all members of that class who did not opt out are bound by the adjudications of the *Hoffman* court—particularly since the Florida contingent of petitioners' class intervened in *Hoffman via* the Florida Attorney General and actively litigated the issue of reasonable fees, presenting the very arguments they now bring to the federal court.

II.

PETITIONERS' ASSERTIONS OF A DUE PROCESS VIOLATION ARE CONCLUSIVELY PRECLUDED BY THE *HOFFMAN* COURT'S DETERMINATION OF ITS OWN JURISDICTION.

Petitioners' attack upon the jurisdiction[9] of the *Hoffman* court is an unsupported conclusory afterthought, contrived in a desperate effort to evade *Rooker-Feldman*. The sufficiency of the notice, the pertinent content of

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[9] Among petitioners' mischaracterizations is their inapt attempt to analogize themselves to a defendant class for the purpose of by-passing this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in favor of the *International Shoe* minimum contacts test. Aside from the fact that several courts have found that minimum contacts are not needed between a defendant class and the forum state (*see, e.g., Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, 139-40 (7th Cir. 1974), the fact remains that petitioners are not a defendant class. That fact, along with the fact that the *Hoffman* court determined its jurisdiction over petitioners, demonstrates clearly that this is not an appropriate case for this Court to decide the issue of whether *Shutts* applies to defendant classes.

which appears in Respondents' Appendix, pages 1-3, is evident on its face. Further, its sufficiency is confirmed by the fact that that notice prompted the intervention of the Florida Attorney General at the behest of and on behalf of the Florida members of the plaintiff class. The fact that that notice prompted a vigorous objection from a significant contingent of the class members establishes that that notice has necessarily served its due process objectives. *Handschu v. Special Services Div.*, 787 F.2d 828, 833 (2nd Cir. 1986); *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963-64 (3rd Cir. 1983).

Moreover, the sufficiency of the notice was adjudicated, not once but three times by the *Hoffman* court. The court approved the notice on December 6, 1993; determined by order of January 24, 1994 that the notice was the "best notice practicable" and that it complied with due process; and again on January 30, 1996 that there was no violation of due process. (Resp. App. 15; Pet. App. 112-113) The *Hoffman* court's decision is conclusive under the Full Faith and Credit Act, 28 U.S.C. § 1738, which directs federal courts to defer to state judgments. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). A state court is fully competent to decide constitutional issues, including those that go to its jurisdiction and where, as here, that issue has not been challenged by appeal, it is conclusive—"erroneous or not." *Underwriters Nat'l Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 714 (1982); *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

As the Court of Appeals noted, there are "significant differences between default judgments and the judgment under attack here." (Pet. App. 10) Petitioners, who purport to represent the plaintiff class, received notice of

both the *Hoffman* fairness and supplementary proceedings. Also, those members of the plaintiff class who responded to that notice by enlisting representation by the Florida Attorney General, participated in the *Hoffman* proceedings but elected to forego appeal of that court's determination of jurisdiction. The plaintiff class members thus wrongly denied the Alabama Supreme Court the opportunity to determine whether its rules governing class action notice provisions satisfy due process and whether to exercise its power to amend those rules to avoid potential constitutional challenges. *See, e.g.*: *Adams v. Robertson*, No. 95-1873, 1997 WL 85127, at *1 (U.S. Ala. Mar. 3, 1997).

III.

PETITIONERS' CHARACTERIZATION OF THEIR CLAIM AS ONE FOR "MALPRACTICE" CANNOT CAMOUFLAGE THE FACT THAT THIS CASE IS EFFECTIVELY AN APPEAL FROM THE ADJUDICATIONS OF THE *HOFFMAN* COURT.

The Seventh Circuit's decision does not stand for the proposition that class counsel may not be sued for legal malpractice. Judge Easterbrook's concern, expressed in his dissent that the panel's decision may stand as precedent barring all malpractice actions, is unsupported by the cases cited by Judge Easterbrook and indeed is improvident. Petitioners' characterization of their claim as one for malpractice cannot obviate the essence of their claim, which is essentially that the *Hoffman* court erroneously decided the amount of fees to be awarded class counsel.

This is a far different question from the one considered in *Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), the principal case relied upon by Judge Easterbrook. The

Durkin court held that class counsel could be sued in malpractice only because that claim did not require the second court to re-litigate any question determined in the earlier class action litigation. The subsequent malpractice action was appropriate because, as the court specifically held, the earlier settlement had decided a question substantially different from that presented by the malpractice action: the determination that payment was reasonable for Rule 23.1 settlement purposes was not the same as the question whether competent counsel could have effected more favorable terms. 92 F.3d at 1516.

The instant case presents a marked contrast. There is no claim that the class should have obtained more benefits. The *only* question is the fact intensive question of "what" is the economic value of those benefits. Petitioners' claim, albeit "dressed up" as one sounding in malpractice, would necessarily reopen the question already directly decided by the *Hoffman* court: the amount of fees which are reasonable and fair in light of the work performed and the economic benefit secured. Petitioners' assertion is that the fees were simply too high and that assertion is one which, under *Rooker-Feldman*, could properly have been pursued only by appellate review. Significantly, Judge Easterbrook made that very point in *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995). The court there ruled that the plaintiff, who had lost an earlier state court civil rights action, effectively sought nothing less from the federal court than collateral review of that state court judgment and such a plaintiff must be sent "where he belongs—the original courts."

Petitioners eschewed that remedy—on several occasions. Their members who intervened *via* the Florida

Attorney General declined to appeal. Also, petitioners refused to participate in the supplementary proceedings conducted by the *Hoffman* court—notwithstanding their admission that that court was not a party to the alleged fraud. Instead, petitioners and their erstwhile *amicus* would have the federal court sit as a reviewing court and engage in the very same fact-intensive inquiry as had been conducted by the *Hoffman* court and thus provide petitioners with a "fresh bite at the apple." Petitioners simply cannot migrate to another tribunal in search of a decision they like better.

CONCLUSION

For the reasons above stated and upon the authorities cited, respondents respectfully pray that this Court deny the petition for issuance of a writ of certiorari.

Respectfully submitted,

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APPENDIX

PUBLISHED NOTICE OF HEARING ON PROPOSED SETTLEMENT OF CLASS ACTION

* * *

Notice is hereby given that a hearing will be held in the Circuit Court of Mobile County, Alabama at the County Courthouse in Mobile, Alabama at 8:00 (a.m.) on the 10th day of January, 1994, to determine whether Judge Kittrell should approve and confirm a proposed Consent Decree settling all aspects, both monetary and equitable, of the above-styled lawsuit as fair, reasonable and adequate. This notice is not an expression by the Court as to the merits of any claim or defense asserted by the parties. Copies of the proposed Consent Decree, a more complete notice of the Settlement terms and your rights as a class member, as well as the prior proceedings in this case, are available for your review and inspection in the Clerk's Office at the County Courthouse in Mobile, Alabama during regular business hours. THIS NOTICE DOES NOT AFFECT YOUR OBLIGATION TO MAKE TIMELY PAYMENTS IN ACCORDANCE WITH THE TERMS OF YOUR MORTGAGE.

* * *

SUMMARY OF TERMS OF PROPOSED CONSENT DECREE

Beginning on the effective date of the Consent Decree, BancBoston will change to the aggregate method of analysis in the calculation and accumulation of escrow deposits. Previously, BancBoston has used the "Individual Item" accrual method. This change in method may result in some of the class members receiving either a

cash refund or a credit in their escrow accounts. Other class members will receive a reduction in the amount by which their escrow accounts are "short" of the necessary funds to be maintained in the escrow accounts. The procedures for implementing this change in methods, as well as the procedures for making the refunds or credits to the escrow accounts, are set forth in detail on pages 2-4 of the more descriptive written notice which each class member who reads this published notice is encouraged to request from Class Counsel.

In addition to the possibility of receiving either a cash refund or credit to their escrow account, some class members will also receive an interest payment from BancBoston. With the exception of class members whose loans were originated after September 1, 1990, all class members who currently have mortgages being serviced by BancBoston will receive a one-time payment of interest calculated according to a formula set forth in the detailed notice which can be obtained from Class Counsel. All class members who had mortgages serviced by BancBoston since May 28, 1981 but who no longer had those mortgages serviced by BancBoston as of November 9, 1993 will also receive a one-time interest payment, but only if those former mortgagors file a form entitled "Intention to Participate in Monetary Distribution", which form can also be obtained from Class Counsel.

Class Counsel will request the Court to award them a reasonable attorney's fee to be paid out of each escrow account based on the benefit conferred on the class after BancBoston has performed certain analysis of the escrow accounts. Class Counsel has indicated that they will request a percentage not to exceed one-third of the economic benefit conferred on the class as a result of this

settlement. The Court will decide whether or not to award attorneys' fees to class counsel at the fairness hearing scheduled for January 10, 1994. This award of fees will include compensation for plaintiffs' counsel's monitoring of BancBoston's future compliance with the terms and provisions of the Consent Decree.

* * *

App. 4

[Dated January 24, 1994]

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

CARL F. HOFFMAN, and DEBORAH L. HOFFMAN,	)	
Plaintiffs,	)	No. CV-91-1880
v.	)	
BANCBOSTON MORTGAGE CORPORATION, and BANK OF BOSTON CORPORATION,	)	(Hon. Braxton L. Kittrell, Jr.)
Defendants.	)	

ORDER OF SETTLEMENT APPROVAL AND FINAL JUDGMENT

THIS MATTER COMES BEFORE the Court for a fairness hearing conducted on January 10 and 11, 1994 to determine final approval of the settlement reached between BancBoston Mortgage Corporation and Bank of Boston Corporation (hereinafter collectively referred to as "BancBoston") and the class represented by Carl F. Hoffman and Deborah L. Hoffman (the "Class"). Having considered the entire record in these proceedings, the report of the Special Master, the oral presentations of counsel and the objector, and the briefs, testimony and evidence presented, and being fully advised of the premises, the Court has entered the Consent Decree and hereby makes the following additional findings of fact and conclusions of law:

I. Events leading up to the Fairness Hearing.

The plaintiffs commenced this action on May 28, 1991, alleging that BancBoston required its mortgagors to pay an amount into escrow accounts for realty taxes, insurance, and other assessments which was in excess of the amount permitted by the mortgage contracts serviced or subserviced by BancBoston. The Plaintiffs alleged that BancBoston's practices with respect to the calculation and accumulation of escrow payments were a breach of the mortgage contracts and were unlawful. The Plaintiffs' complaint, and the subsequent amendments thereto, also contained allegations of other claims such as breach of duty, fraud, and violations of various state and federal laws.

BancBoston denied that its actions with respect to the escrowed mortgage loans that it services or subservices were unlawful or violated the mortgage contracts or any laws. BancBoston argued that the individual mortgage contracts, HUD, and RESPA regulations allowed. [sic] BancBoston to use the methodology it employed. BancBoston filed motions to dismiss on numerous grounds, which were denied.

On July 2, 1992, this Court granted the Plaintiffs' Motion for Class Certification and determined that the lawsuit should proceed as a class-action with Carl F. Hoffman and Deborah L. Hoffman as the representatives of the class.

On October 12, 1993, the Court granted a partial summary judgment in favor of the Plaintiffs and all class members on the breach of contract claim, declaring that the escrow account deposit requirements imposed by

BancBoston exceeded those allowed under the mortgage contracts.

Prior to entering into the proposed settlement agreement, the parties engaged in substantial motion practice and discovery, primarily in the nature of document review. After much arm's length and good-faith bargaining, the parties signed a global settlement on November 9, 1993 (the "Settlement Agreement"). The parties submitted the Settlement Agreement as a Consent Decree to this Court along with a motion for preliminary approval of the Consent Decree, a proposed order conditionally approving the Consent Decree, proposed forms of notice to be mailed to the Class and published in *USA Today*, the form giving notice to appear and object, the form for requesting exclusion, and the form for signifying an intention to participate in monetary distribution for sub-class two members.

On December 6, 1993, this Court entered an order granting the motion for preliminary approval of the Consent Decree, and BancBoston began mailing the approved notice to all current and past mortgage holders as provided in the Consent Decree.

II. The Notice of Hearing on Proposed Settlement of Class Action.

On December 6, 1993, BancBoston began mailing by first-class mail approximately 315,000 notice packets to every current mortgage holder and approximately 100,000 notice packets to the last known address of past mortgage holders who had an account with BancBoston within the last year. The notice packet sent to all class members included the court-approved Notice of Hearing

on Proposed Settlement of Class Action, a Notice to Appear and Object form, and a Request for Exclusion form. In addition, the notice packet to the past mortgagors contained the Intention to Participate in Monetary Distribution form.

In addition to the mailed notice packets, notice was published nationwide in the December 13 and 20, 1993 editions of *USA Today*. Class counsel set up message center telephone lines providing a layman's explanation of the terms of the settlement. Class counsel also fielded thousands of telephone calls and replied to hundreds of letters from the Class requesting additional information.

III. Requests for Exclusion, Objections to the Proposed Settlement, and Intentions to Participate in the Monetary Distribution.

Prior to the January 3, 1994 cutoff date established by the Court for the filing of Requests for Exclusion, approximately fifteen hundred such requests were filed with the Court.[1] Class counsel attempted in good faith to contact several of these people to determine the nature of the Request for Exclusion. Most of the persons contacted who requested exclusion did not wish to participate in any type of class action litigation or did not feel that BancBoston had handled their Individual account improperly.

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[1] Class counsel have represented to the Court that a complete list of those who have chosen to exclude themselves from the Consent Decree will be forthcoming as soon as all the forms are processed and compared among the parties.

In addition, approximately two hundred class members sent the Notice of Intent to Appear and Object by the deadline for filing such matters. Class counsel have in good faith attempted to contact each of the persons objecting to the class action, and found that all of the persons objecting to the settlement, except four, sent that form in only by mistake due to the similarity of that form and the Intention to Participate form. Of the remaining persons objecting, one complained that notice should also be sent prior to the settlement, one felt that people who have held their mortgages longer should get more interest, and the Florida Attorney General objected for reasons discussed more thoroughly below.

As of January 6, 1993, approximately 15,000 claim forms signifying the Intention to Participate in Monetary Distribution had been received by all the parties and the Circuit Clerk's office.

IV. The Fairness Hearing.

A. Substantive issues regarding the Proposed Settlement Agreement.

On January 10, 1994, this Court conducted a fairness hearing to determine whether final approval of the Consent Decree should be granted. At the fairness hearing, Class counsel presented evidence regarding the reasonableness of the Consent Decree. In addition, Class counsel reiterated the protracted and highly contested litigation manifested by this case, highlighting the extensive negotiations for settlement.

The only significant objector, the Florida Attorney General [sic] had two arguments addressing the substantive

merits of the Consent Decree. First, he argued about the preaccrual dates on the individual escrow accounts. The Florida Attorney General further argued that any unclaimed funds and interest payments for Florida residents should be paid to the office of the Florida Attorney General and should not revert to BancBoston. With respect to the argument concerning the preaccrual dates, this Court finds that the provisions concerning preaccrual in the Consent Decree are the same as those offered by the Florida Attorney General in his earlier proposed settlement with BancBoston. The Court further finds that the preaccrual provisions in the Consent Decree are consistent with and not materially different from those found in similar settlements such as the *Fleet Mortgage* and *GMACM* cases.

With respect to the second argument raised by the Florida Attorney General (unclaimed funds and interest payments), the Court finds that such a request would confer no additional benefit on the Class and is inconsistent with the treatment of unclaimed funds and interest payments in substantially similar escrow account class actions. The Florida Attorney General also failed to present statutory or other legal grounds to justify his request that the Florida residents' unclaimed funds and interest payments should revert to the office of the Florida Attorney General.

The principal benefit of the settlement is that BancBoston Mortgage Corporation shall hereafter use a formula to compute escrow account deposit requirements which plaintiffs contend more closely follows the provisions of each mortgage note. This will result in lower escrow account requirements for most mortgagors. The new formula or methodology to be adopted as a conse-

quence of this settlement is commonly referred to as "cash basis" or "aggregate override" analysis.

In addition to the change in the method by which BancBoston calculates the escrow deposits, the Consent Decree provides that BancBoston will promptly refund or credit to the mortgagor's accounts any cushion or surplus that results from the initial change in the accounting method. This will create a common fund of settlement proceeds.

BancBoston will also pay interest to each of the subclass one members (current mortgage holders) and to those subclass two class members (past mortgage holders) who timely filed an Intention to Participate in Monetary Distribution form as provided in Paragraph eight (8) of the Consent Decree. The interest paid to each subclass one member is $8.76, and $1.78 will be paid to each subclass two member. The interest increases the common fund of settlement proceeds.

Class counsel presented evidence regarding the economic benefit conferred on the Class as a result of the creation of the common fund. Class counsel submitted the affidavit of Dr. Albert Madansky and presented Mr. Walter McKean, C.P.A., to testify. Mr. McKean testified that the economic benefit to the Class could be calculated using a statistical sample of BancBoston's mortgage holders. Class counsel provided the affidavit of Mr. Michael Koster, Senior Vice President of BancBoston regarding the sampling techniques, and Mr. McKean testified that the sampling was valid.

Mr. McKean further testified that based on the sample, the average mortgage holder had 20 years left on his or her mortgage. The average interest rate on such a mort-

gage was 8.6 percent. Thus, Mr. McKean testified, if the average mortgage holder were to receive a $100.00 refund and apply it to his or her mortgage, he or she could reduce his or her principal $545.00 by the time his or her mortgage was paid off.

This Court finds that based on the testimony, the economic benefit to the Class is defined as the following:

(a) any cash refund to the class members as a result of the change in methodology;

(b) any credit or decrease reflected on a class member's escrow account in an overage, shortage or combination overage and shortage situation[2];

(c) Interest payments to the class member's escrow account.

While the foregoing constitutes clearly calculable economic benefits, this Court finds that the Class has accumulated other less easily quantifiable economic and noneconomic benefits such as:

(a) BancBoston shall hereafter be required to utilize a new escrow account analysis methodology when determining mortgage escrow account deposit requirements that will result in each class member's escrow account balance being reduced, in accordance with the most recent analysis completed by BancBoston, by an average of 19.0%.

(b) BancBoston, after performing its annual escrow account analysis, will immediately refund or credit the mortgagor's accounts in an amount equal to any escrow overages found in the escrow account.

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[2] The terms "overage" and "shortage" as used in this Order mean the same as used heretofore in BancBoston's annual escrow account statements sent to the individual mortgagor.

(c) The new escrow analysis methodology creates a reduction in the lien on the mortgagor's property because funds held in escrow accounts stand as security for the underlying debt.

(d) The class members have the option of receiving a refund immediately which creates much additional value in the face of increasing taxes (and the consequent increase in required escrow).

(e) Class counsel and their expert, Dr. Albert Madansky, will monitor BancBoston's compliance with the Consent Decree for the next three years.

Under the terms of the Consent Decree, the Class continues to reap the monetary benefits of the new methodology as long as his or her mortgage remains with BancBoston. It is this Court's opinion that this prospective relief is the most that could be maximized from this case even if the case had progressed to a very favorable jury verdict.

B. Attorneys' Fees.

At the fairness hearing, Class counsel submitted evidence regarding the amount of attorneys' fees this Court should award. Class counsel presented the affidavits of William J. Baxley, Edward L. Hardin, and George L. Beck. The Court heard testimony from J. Doyle Fuller and Richard T. Bounds who both stated that a fee equal to one-third of the settlement proceeds was reasonable and fair under Alabama law. Mr. Fuller has been involved in over 40 class actions in Alabama and further testified that the results achieved in this case would justify a fee of forty percent (40%) of the settlement proceeds. Mr. Bounds testified that he had reviewed the ex-

tensive pleadings and documents produced in this case, and further testified that in his experience, fees up to 40% and not less than one-third of the recovery were reasonable.

Class counsel submitted the affidavit of Mr. Michael Koster, Senior Vice-President of BancBoston who testified that under the last analysis performed by BancBoston, the difference in the escrow account portfo lio between the new and old methodology was 19%. Class counsel proposed that attorneys' fees be awarded as one-third of 19% of the balance reflected in the escrow accounts at the time that the annual escrow analysis is calculated.

The Florida Attorney General objected to the attorney's fee request, and essentially raised the following arguments in opposition to Class counsel's request for attorneys' fees:

(a) If any attorney's fees are due to Class counsel, BancBoston should be the party which directly pays the fees and they should not be awarded out of the benefit conferred on the Class as a result of the Consent Decree;

(b) If any fees are awarded, they should come solely from the interest payments to be made by BancBoston and not from the individual mortgagor's escrow account; and

(c) The *Fleet* and *GMACM* cases provided for a different attorneys' fee formula than the one proposed here by Class counsel.

With respect to the Florida Attorney General's arguments, the Florida Attorney General has failed to produce any statutory or legal authority that directs BancBoston to pay attorneys' fees. Class counsel, John

W. Sharbrough, testified that the Alabama Rules of Professional Conduct prevent such negotiation for fees from opposing parties when to do so would interfere with the lawyer's independence or the attorney-client relationship. Mr. Sharbrough further testified that in his opinion negotiations with the defendant would have interfered with his best judgment and compromised his independence. As a practical matter, any concession to pay fees by BancBoston would have diminished the class relief.

With respect to the Attorney General's third argument, Mr. Sharbrough testified that the *Fleet* and *GMACM* cases did not involve the change in accounting methodology to cash basis. In addition, the Court notes that this is the only escrow case of those proffered as evidence which proceeded as far as a partial summary judgment on the breach of contract issue.

Mr. Sharbrough testified that there are only three members in his firm, including himself. He further testified that the firm had turned away work because of the demands of this case, and that the firm's associate has devoted nearly all her time to this case. Class counsel will continue to have demands placed on them by the future monitoring and auditing for three years hence.

The Court has weighed the foregoing objections of the Florida Attorney General in making its determination of attorneys' fees as outlined below. However, it is this Court's opinion that the award of fees to class counsel in cases such as this one is a matter best left to the sound discretion of the Court.

It is this Court's further opinion that the attorneys representing the Class enjoy an excellent reputation, and have considerable expertise in consumer fraud class

action cases and cases involving excessive escrow deposit requirements in particular. They have prosecuted this case without any compensation whatsoever and have represented the Class on a contingency fee basis.

Based on the foregoing and having considered the entire record in these proceedings, the report of the Special Master, the oral presentations of counsel and the objectors, and the briefs, testimony, and evidence presented, it is the ORDER, JUDGMENT, and DECREE of this Court that:

A. The notice given to members of the Class by publication and by mail, as aforesaid, complied with all requirements of due process, all requirements of Rule 23 of the Alabama Rules of Civil Procedure, and constituted the best notice practicable under the circumstances. The former Fifth Circuit Court of Appeals has made it clear that Rule 23(e) mandates individual notice only to those potential class members who can reasonably be ascertained. *In re Beef Industry Antitrust Litigations*, 607 F.2d 167, 178-179 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981).[3] Thus, any additional expense in locating and notifying any class members who may not have received individual notice would be outweighed by the tremendous expense of doing so, and which expense would materially reduce the fund available for all class members.

B. The number of those members who wish to exclude themselves from the Consent Decree is less than the

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[3] The Alabama Supreme Court has held that federal authorities, while not binding, are persuasive when interpreting the Alabama class action rule. *First Baptist Church v. Citronelle-Mobile Gathering, Inc.*, 409 So. 2d 727 (Ala. 1981).

number that would permit any party to withdraw from the settlement.

C. Due and adequate notice of the proceedings has been given to members of the Class, and a full opportunity has been offered to members of the Class to object to the Consent Decree and to participate in the hearing thereon. Thus, the Court finds that the Consent Decree is fair, reasonable and in the best interests of the Class as compared to the uncertainties of litigation of the claims involved, the significant cost, time and effort such litigation would entail on behalf of all parties regardless of the outcome, and the considerable burden that continued litigation would impose upon the Court and upon the relationship that exists between the plaintiffs, the class members, and defendants. The Court makes this determination based upon oral presentations by counsel, expert testimony, and the other evidence before this Court, and after duly considering and weighing the objections presented at the Fairness Hearing.

D. The usual and customary contingency fee in this locality is no less than thirty-three and one-third percent (33⅓%), and such fees frequently are between forty (40%) and fifty (50%) percent. In this case, because of the broad responsibilities and risks assumed by class counsel, and the unprecedented results achieved by Class counsel, Class counsel's efforts merit a fee based on a percentage of the economic benefit conferred by this settlement. The total fee recovery as set out below is found to be reasonable in light of the fact that the future benefit conferred upon the Class by this Consent Decree is substantial and is at least as valuable to the Class as the immediate refund to the Class of the settlement proceeds from the common fund. This Court makes this

determination after taking into the account the objections of the Florida Attorney General.

E. In place of the second sentence of Paragraph 9 of the Consent Decree and in accordance with the remaining provisions of the Consent Decree, the Court directs that BancBoston shall credit each Class members' account with the interest as provided in Paragraph eight (8) of the Consent Decree by April 1, 1994. At the beginning of each month, for accounts scheduled to be analyzed that month, BancBoston will deduct attorneys' fees from each escrow account in the amount of 28 percent multiplied by 19% multiplied by the escrow balance at that time. BancBoston will then perform the analysis using the new accounting methodology. BancBoston shall pay said fee to Ezell & Sharbrough, and shall provide Class counsel with documentation reflecting the calculations of said amounts. Ezell & Sharbrough shall apportion the fees between Class counsel in accordance with their prior agreement.

F. All of the claims deemed released by the named plaintiffs and Class members, in accordance with the provisions of Paragraphs 16 and 17 of the Consent Decree, shall be known as the Released Claims. Under this Order and the terms of the Consent Decree, the named plaintiffs and class members who have not requested exclusion from the Class are hereby severally and permanently barred and enjoined from asserting any of the Released Claims in any court or forum whatsoever.

G. BancBoston shall not change its customary and ordinary business practices with respect to any escrow account in any manner that will diminish or circumvent

any of the provisions of this Order or the Consent Decree.

H. The Parties are ordered to implement the Consent Decree and Consent Decree. [sic]

I. The Clerk of this Court is directed to furnish to BancBoston all of the Intention to Participate in Monetary Distribution forms it receives.

J. The fees and expenses of the Special Master are to be paid by class counsel. Otherwise, each party is to bear its own costs.

It is further hereby ORDERED, ADJUDGED and DECREED by this Court that the Consent Decree should be and is hereby ENTERED and APPROVED, and this Order is hereby entered as a final judgment pursuant to Rule 54, Ala. R. Civ. P.

GIVEN UNDER MY HAND THIS 24th DAY OF JANUARY, 1994.

_____

CIRCUIT COURT JUDGE

[Dated January 24, 1994]

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

CARL F. HOFFMAN and DEBORAH L. HOFFMAN, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO.
BANCBOSTON MORTGAGE CORPORATION and BANK OF BOSTON CORPORATION,	)	CV-91-1880
Defendants.	)	

CONSENT DECREE

WHEREAS, the plaintiffs, Carl F. Hoffman and Deborah L. Hoffman, on behalf of themselves and all others similarly situated, filed their complaint in this action against the defendants, BancBoston Mortgage Corporation and Bank of Boston Corporation (collectively "BancBoston" or "defendants"), on May 28, 1991; and

WHEREAS, BancBoston is a servicer of mortgage loans secured by one to four-family dwellings which mortgages or other security instruments ("mortgage" or "mortgages") provide for escrow payments of realty taxes and insurance ("residential real estate mortgage loans"); and

WHEREAS, plaintiffs alleged in their complaint, as amended, that BancBoston has required its mortgagors to deposit into their mortgage escrow accounts, from which realty taxes and insurance premiums are paid, an

amount in excess of the sums provided for in the standard-form mortgage contracts and that BancBoston's calculation and accumulation of escrow deposits is illegal; and

WHEREAS, BancBoston has denied the material allegations of the complaint, as amended, and continues to deny liability in any amount; and

WHEREAS, counsel for BancBoston has provided certain information and made certain representations to counsel for plaintiffs and the class regarding BancBoston's escrow practices and the methodology used by BancBoston in calculating and accumulating escrow deposits; and

WHEREAS, counsel for plaintiffs and the class has investigated the facts and the applicable law; and

WHEREAS, the plaintiffs and defendants have had the opportunity to evaluate their respective positions on the merits; and

WHEREAS, the issues before the Court are extremely complex and, if fully litigated, will likely result in protracted litigation, appeals and continued uncertainty as to outcome; and

WHEREAS, counsel for the plaintiffs and the class is qualified to evaluate the fairness, reasonableness and adequacy of this settlement on behalf of the plaintiffs and the class members; and

WHEREAS, the parties to this action desire to avoid the additional cost, time, effort and uncertainties which would result from the continuance of this litigation, regardless of the outcome, and desire to enter into the settlement embodied in this Consent Decree; and

WHEREAS, the parties agreed on all of the terms of this settlement through extensive arms-length negotiations between counsel for the plaintiffs and counsel for the defendants; and

WHEREAS, the attorneys for the parties reached agreement on the terms of relief to be afforded the plaintiffs and the plaintiff class prior to the discussion of the fees and expenses to be paid to the plaintiffs for their attorney's services in this action; and

WHEREAS, this settlement provides substantial benefits to the class, resolves substantial issues without prolonged litigation and provides certain current and former mortgagors of BancBoston Mortgage Corporation with a benefit significant in the aggregate; and

WHEREAS, settlement of this action at this stage will relieve the significant burden that otherwise will be imposed upon the Court and the parties; and

WHEREAS, the parties believe that this settlement is fair, reasonable and adequate and that the best interests of all concerned lie in this Consent Decree, with the attendant benefits to the plaintiffs and the class members, without the burden and uncertainties created by pending litigation; and

WHEREAS, BancBoston denies any wrongdoing and any liability whatsoever, BancBoston has concluded that it is in its best interest to settle the litigation on the terms set forth in this Decree in order to avoid further expense, inconvenience and interference with ongoing business operations; and

WHEREAS, the Court tentatively approved this Consent Decree on _____, 1993, based upon the

Court's initial determination that the settlement reached by the parties is fair, reasonable and adequate, and thereafter, the Court gave notice of the proposed Decree to the class members, notifying them of the terms of the Decree and of their opportunity to file and express objections to the Decree or any provision thereof and notifying them of each class member's respective rights and obligations with respect to the Decree, such notices being in compliance with Rule 23 of the Alabama Rules of Civil Procedure and due process; and

WHEREAS, the Court held a hearing on January 10, 1994 for the purpose of adducing evidence regarding the fairness, reasonableness and adequacy of the Decree, for the purpose of hearing any objections to the Decree or any provision thereof, and for the purpose of determining the fairness, reasonableness and adequacy of the Decree; and

WHEREAS, the Court, after considering the evidence adduced at the fairness hearing, has approved the Decree as fair, reasonable and adequate as to all affected parties and persons.

NOW, THEREFORE, the Court being fully advised in the premises, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Court has jurisdiction over the subject matter of this action and the parties to this action.

2. This Decree is, and shall be, applicable to and conclusive and binding upon all parties to this action, including the named plaintiffs, members of the plaintiff class (named or unnamed), and defendants and their successors and assigns.

3. The Court confirms that the class consists of all persons (and in the case of deceased or disabled persons, their estates, personal representatives, beneficiaries or conservators) whose loan was secured by a residential real estate mortgage and for whom BancBoston or its predecessors acted as servicer at any time from May 18, 1981 to the present. The Court finds that the prerequisites of Rule 23(a) of the Alabama Rules of Civil Procedure are satisfied and, in addition, that the provisions of Rule 23(b)(2) and Rule 23(b)(3) are applicable.

4. Beginning within ninety (90) days after the effective date of this Consent Decree (or, at the sole discretion of BancBoston, sooner than the effective date), BancBoston shall adopt and institute the following changes with respect to the calculation and accumulation of escrow deposits for all residential real estate mortgage loans serviced or subserviced by BancBoston now or in the future. These changes are cumulative, and each may result in a change in the amount of funds required in an escrow account:

a) BancBoston shall estimate future escrow disbursements based upon current data and reports and other information which provide reasonable estimates of future escrow disbursements. BancBoston may use the prior year's escrow payments as a base for estimating future escrow disbursements.

b) BancBoston shall use the aggregate method of analysis in the calculation and accumulation of escrow deposits and may maintain a maximum of a two-month reserve in any given escrow account, except as otherwise provided in paragraph 4(d) of this Decree. At its customary annual analysis of each current and future mort-

gagor's escrow account (or more frequently if BancBoston so elects), BancBoston shall prepare a running trial balance projection setting forth expected mortgage payment receipts, projected escrow disbursements, and expected escrow balances for the analysis period beginning with the date any change made in the amount of the mortgagor's payment as a result of the annual analysis becomes effective ("trial balance"). (By way of example, for an annual analysis performed in September, 1993, with an effective payment change date of November 1, 1993, BancBoston will prepare a trial balance from November 1, 1993 to October 31, 1994. BancBoston shall calculate the trial balance based on BancBoston's reasonable estimate of the amounts of the items to be disbursed from the escrow account during the analysis period).

In preparing the trial balance, BancBoston shall assume the disbursement of an escrow item, in any given month, will post-date BancBoston's receipt of the mortgagor's mortgage payment for that month, except that BancBoston shall be entitled to assume the disbursement of an escrow item whose projected disbursement date is from the first through the fifteenth day of the month, will predate BancBoston's receipt of the mortgagor's mortgage payment for the month of disbursement. To the extent BancBoston cannot project an expected disbursement date within a given month, BancBoston shall assume the receipt of the mortgagor's mortgage payment will predate disbursement of the related escrow item.

c) To the extent the expected lowest balance in the escrow account exceeds one-sixth (1/6) of the anticipated total amount of the escrow items that are due during the analysis period ("1/6 low point"), then

BancBoston shall: (1) automatically prorate the determined surplus and reduce the mortgagor's payments (except in those states that do not permit applying the surplus in this manner); or (2) upon request, refund the surplus to the mortgagor; or (3) upon request, apply the surplus to principal; or (4) upon request, apply the surplus to the next payment(s), provided that the mortgage is not in default, otherwise delinquent, or the resulting escrow on deposit is not less than the escrow needed for future escrow disbursements. Notwithstanding the foregoing, BancBoston may collect and hold an amount exceeding the 1/6 low point set forth above if the mortgagor so requests.

d) BancBoston shall use the aggregate method of analysis and reasonable estimates of future disbursements (subject to the terms of paragraph 4(a)) in the calculation and accumulation of escrow deposits and shall maintain (i) no reserve in the escrow account with respect to FNMA/FHLMC mortgages that contain language substantially the same as the language contained in the documents attached to this Decree and that were entered into prior to September 1, 1990, and (ii) one month's reserve in the escrow account with respect to (a) VA mortgages and (b) FHA mortgages that contain language substantially the same as the language contained in the documents attached to this decree as Appendix B and that were entered into prior to September 1, 1990. The aggregate projected escrow account balance for these mortgages shall be anticipated to fall to zero or one-twelfth (1/12), as the case may be, at least once during the twelve (12) month period following the effective payment change date. BancBoston shall treat surpluses in accordance with the provisions of paragraph 4(c)(1)-(4) of

this Decree and shall treat shortages in accordance with the provisions of paragraph 4(f) of this Decree. Notwithstanding the foregoing, BancBoston may collect and hold an amount exceeding the zero low point set forth above if the mortgagor so requests.

e) Subject to applicable law, (1) the selection of the appropriate analysis date and effective payment change date shall be at BancBoston's discretion; and (2) BancBoston is permitted to perform its escrow analysis pursuant to the above provisions more frequently than once a year, and may, at its discretion, change the date of any given mortgagor's escrow analysis. In addition, the parties and the Court recognize that in applying the above provisions, BancBoston is performing a projection of future events. As such, assuming BancBoston has acted in good faith, BancBoston shall have no liability if the actual billing amounts, disbursement dates, or other projection items differ from those assumed at the time of analysis, or if errors are made in good faith and the escrow accounts affected by such errors are corrected after discovery. By way of example, but not limitation, BancBoston shall be entitled to utilize prior year disbursement dates in setting expected disbursement dates for the upcoming year.

f) BancBoston shall collect escrow shortages (defined as the deficiency in funds determined to exist during the escrow analysis performed in conjunction with the methods described in section 4(b)) by spreading the shortage over: (1) not less than six (6) months; or (2) the number of months until the next escrow analysis, at BancBoston's sole option. Notwithstanding the foregoing, BancBoston may collect escrow advances ("negative escrow balances") by sending written notice of the de-

ficiency to the mortgagor and requesting one or more payments to cure that deficiency to begin not less than thirty (30) days after the date of the notice.

g) If a mortgagor provides evidence of payment of realty taxes and insurance for any given period (other than by BancBoston from escrow funds), BancBoston shall promptly refund any realty tax or insurance deposits accumulated for that period, provided that the mortgage is not in default, otherwise delinquent, or the resulting escrow on deposit is not less than the escrow needed for future escrow disbursements.

h) BancBoston, the plaintiffs and all class members agree that the contracts, promissory notes, mortgages, deeds of trust, security instruments, and any and all other documents, understandings or agreements constituting, establishing or evidencing the contractual relationship between the plaintiffs and class members and BancBoston, or between the plaintiffs and class members and the entities for which BancBoston services, serviced, subservices or subserviced class members' loans ("the mortgage contracts") are hereby modified to allow BancBoston to service or subservice the loans of all plaintiffs and class members in accordance with the terms of this Decree.

5. Counsel for plaintiffs and the class has the right to monitor BancBoston's compliance with this Consent Decree for a period of three years following the effective date of the Decree. BancBoston agrees to cooperate with counsel for plaintiffs and the class and provide 300 sample loans selected at random for each of the next three years in order for counsel for the plaintiffs to ensure BancBoston's compliance with this Consent De-

cree. The random sample shall include loans for which there are multiple or different due dates for tax and insurance payments during the year.

6. In the event BancBoston believes that it is required to change its escrow practices in the future to comply with or conform to applicable statutes, regulations, case law, or standard-form mortgage contracts, which govern the mortgage contract signed by the borrower with respect to the methodology and formula by which escrow deposits are calculated and accumulated, BancBoston shall give thirty (30) days advance notice of such proposed change or modification to counsel for the plaintiffs and the class. The notice shall identify the proposed change or modification, explain why BancBoston believes that the proposed change or modification is required and state how BancBoston intends to implement the proposed change or modification. If BancBoston and counsel for plaintiffs and the class cannot agree that the change or modification is either required or not required, counsel for plaintiffs and the class shall have an additional thirty (30) days within which to file a written objection with the Court and to seek a hearing before the Court to determine whether the change or modification is required. If counsel for the plaintiffs and the class does not file a written objection within the time period stated above, BancBoston may implement the change or modification.

7. BancBoston shall pay Two Thousand Five Hundred Dollars ($2,500.00) to each of the two class representatives, Carl F. Hoffman and Deborah L. Hoffman, for their services as named plaintiffs and class representatives.

8. In addition to the amounts to be paid to eligible class members under paragraphs 4(c) and (d) of this Decree, BancBoston shall make a single payment to each eligible class member in complete satisfaction of all claims that were raised or could have been raised in this action, as well as any and all other claims for damages, prejudgment interest, postjudgment interest or any other monetary or injunctive relief not otherwise provided for herein of any nature whatsoever which have been or could have been alleged in the complaint for the period May 28, 1981 to the effective date of this Decree ("the monetary distribution" or "the monetary fund"). Loans originated subsequent to September 1, 1990 are excluded from the single payment.

BancBoston shall distribute, as described above, the monetary fund to eligible class members within the class. The Court conditionally approved and does hereby finally approve two monetary subclasses which are more particularly described as follows:

A. Subclass Number One (consisting of active loans) is composed of all persons whose residential real estate mortgage loans BancBoston or its predecessors serviced or subserviced and for which escrow accounts were maintained for at least six (6) months, and is still servicing or subservicing as of November 9, 1993. With respect to this Subclass, BancBoston shall make a one-time payment to the Subclass members in an amount equal to fifty percent (50%) multiplied by seven point five (7.5) multiplied by (four (4) percent minus the interest rate paid on escrow, if any), multiplied by the average escrow surplus, which has been determined to be $58.41. The average escrow surplus was deter-

mined by using a statistically reliable sample of loans with escrow accounts which BancBoston serviced during the years 1989, 1990 or 1991. Each loan in the sample was serviced by BancBoston for the entire calendar year for which the loan was selected and the escrow account was analyzed during such year. The sample of loans is statistically valid and the loans were selected randomly such that the sample is representative of the loans serviced by BancBoston during 1989, 1990 and 1991. BancBoston then reviewed the escrow accounts of the random sample loans to identify each account which contained an escrow surplus and the amount of such escrow surplus. For purposes of this review, escrow surplus means the amount by which the lowest balance the escrow account reached during the year reviewed exceeded two months' escrow collection. This was determined by adding that year's normal escrow disbursements and dividing by twelve (12), then multiplying by two (2). The average surplus was then determined by adding the escrow surplus, if any, for each loan in the sample and then dividing that total by the number of loans in the sample.

Class members who are more than thirty (30) days past due in their mortgage payments will not receive a payment under the settlement. Banc Boston shall pay the above-determined amounts to the eligible class members by making an electronic deposit to each subclass member's escrow account within ninety (90) days after this Decree has been finally approved by a court order which is final, unappealable and otherwise unreviewable.

B. Subclass Number Two (comprised of former mortgagors) is composed of all persons whose residential real estate mortgage loans BancBoston or its predecessors serviced or subserviced for a minimum of six (6) months anytime after May 28, 1981 for which escrow accounts were maintained and that have been paid off, transferred, waived, or otherwise removed from BancBoston's books and records as of November 9, 1993, but not including those persons whose mortgages were foreclosed or, for whatever reason, whose mortgages were in default at the time the mortgage was transferred, waived, or otherwise removed from BancBoston's books and records.

With respect to this Subclass, BancBoston shall make a one-time payment in an amount equal to 2.5 multiplied by 4% multiplied by 50% multiplied by the average escrow surplus to each Subclass member who timely files the requisite "INTENTION TO PARTICIPATE IN MONETARY DISTRIBUTION." For purposes of Subclass Number Two, BancBoston has determined the average escrow surplus to be $35.63 by using a statistically reliable sample of loans with escrow accounts which BancBoston serviced during the years 1989, 1990 or 1991. Each loan in the sample was serviced by BancBoston for the entire year for which the loan was selected and the escrow account was analyzed during such year. The sample of loans is statistically valid and the loans were selected on a random basis such that the sample is representative of the loans serviced by BancBoston during 1989, 1990, and 1991.

BancBoston then reviewed the escrow accounts of the sample loans to identify each account which contained an escrow surplus and the amount of such escrow surplus. For purposes of this review, escrow surplus means the amount by which the lowest balance in the escrow account during the year exceeded two (2) months' escrow collection. This was determined by adding that year's normal escrow disbursements and dividing by twelve (12) then multiplying by two (2). Loans where interest on escrow was paid during the year reviewed were counted as having no surplus. The average surplus was then determined by adding the escrow surplus, if any, for each loan in the sample and then dividing that total by the number of loans in the sample. BancBoston shall begin distributing these payments by mailing a check to the last known address of the claimant within ninety (90) days after this Decree has been finally approved by a court order which is final, unappealable and otherwise unreviewable.

9. Counsel for plaintiffs and the class have requested the Court to award them a reasonable attorney's fee to be paid out of each escrow account based on the benefit conferred on the class after BancBoston has performed the analysis set forth in paragraphs 4(b), (c) and (d) of this Decree. The Court hereby awards counsel for plaintiffs and the class an attorney's fee to be paid out of each escrow account based on the benefit conferred on the class after BancBoston has performed the analysis set forth in paragraphs 4(b), (c) and (d) of this Decree in an amount equal to ____% of the economic benefit conferred on the class. In addition, BancBoston will pay plaintiffs

[sic] expert, Dr. Madansky, a maximum of $20,000 to cover the costs of monitoring compliance with this settlement. The Court finds that the amount awarded by the Court, together with the amount to be paid to Dr. Madansky, shall constitute a complete satisfaction of all claims against BancBoston for attorneys' fees for services rendered to the plaintiffs or the class in connection with any and all aspects of this litigation, and a complete satisfaction of any and all claims against BancBoston for reimbursement of any expenses incurred in connection with this litigation for any purpose whatsoever, including, but not limited to, out-of-pocket expenses, copying charges, witness fees, deposition costs, expert witness fees, paralegal expenses, and the like. This award of fees includes compensation for plaintiffs' counsel monitoring Banc Boston's compliance with the Consent Decree as set forth in paragraph 5 of this Decree. BancBoston shall distribute the above fees, costs and expenses to counsel for plaintiffs and the class on a monthly basis after the analysis set forth in paragraphs 4(b), (c) and (d) has been performed.

10. BancBoston shall begin distributing the monetary fund described in paragraph eight above not more than ninety (90) days after this Decree has been finally approved by a court order which is final, unappealable, and otherwise unreviewable. In the event the Decree, or any order related thereto, is appealed, and an appellate court affirms the entry of the Consent Decree, such that the Consent Decree and each provision thereof is final, unappealable, otherwise unreviewable and binding, Banc Boston shall begin distributing the monetary fund within ninety (90) days after such affirmation.

11. BancBoston shall provide to counsel for plaintiffs a count of class members who have cashed distribution checks within 90 days of the effective date of the Consent Decree. BancBoston shall supplement the count within 180 days of the effective date of the Decree.

12. BancBoston's address shall serve as the return address on all envelopes used to mail checks to plaintiffs and class members. BancBoston shall maintain exclusive control over distribution checks which have been returned. If BancBoston is unable to deliver a distribution check or if a class member does not cash his or her distribution check within six (6) months of the date of the check, BancBoston shall have no obligation to honor such a check or to issue a new check, and said funds shall revert to and remain the property of BancBoston.

13. In the event any portion of the monetary fund cannot be paid to any specified eligible class member because that class member is deceased, that class member's share shall be distributed to the deceased class member's estate, personal representative, or heirs at law, as determined by the Court, in a manner which is equitable and consistent with the laws of the State of the deceased class member's residence upon due proof by any person claiming entitlement to the deceased class member's share. Any competing claims to a deceased class member's share of the monetary distribution in this case shall be determined by the Court subsequent to the entry of this Consent Decree in an appropriate proceeding upon due notice and opportunity to be heard by the competing claimants.

14. In addition to the monetary relief aspects of this case as explained and defined in paragraphs 4, 7, 8 and

9 above, the parties have agreed and this Decree embodies, in paragraph 4, many aspects of relief to operate prospectively which are for the benefit of the class members and future mortgagors. Such affirmative and prospective relief is in lieu of and in consideration for any further claim to monetary or equitable relief and is considered an essential component of this Decree. The substantial prospective relief contained in this Decree is more fully set forth in paragraph 4 hereinabove and will operate prospectively upon the effective date of this Consent Decree.

15. Defendants' obligations under this Decree are limited solely to the undertakings set forth in this Decree.

16. This Decree is final and binding upon the plaintiffs, all individual class members, except those who "opted out" or excluded themselves from the settlement class pursuant to Rule 23(c)(2) of the Alabama Rules of Civil Procedure, and BancBoston and their successors and assigns. The negotiation, execution and entry of this Decree, and the undertakings made by BancBoston, are in full and final settlement and compromise of all rights, duties and obligations of all parties, including the named plaintiffs and class members, with respect to any and all issues which relate in any way to any issue or claim for monetary or equitable relief in this action.

17. Upon the effective date of this Consent Decree, each plaintiff and class member who did not properly and timely opt out of the settlement class is deemed to have released and is hereby enjoined from suing, and each plaintiff and class member agrees to refrain from proceeding in any way against: (i) BancBoston; (ii) any and all direct and indirect subsidiaries, affiliates and

parents of BancBoston; (iii) the entities for which BancBoston serviced or subserviced their escrowed mortgage loans ("entities") (for the period during which BancBoston serviced or subserviced their escrowed mortgage loans); (iv) each officer, director, principal, agent, attorney, employer, employee, division, owner or partner of BancBoston or such entities (for any period during which BancBoston serviced or subserviced their escrowed mortgage loans); and (v) any successor (with respect for the period for which BancBoston did the servicing or subservicing), predecessor acquired by BancBoston, personal representative, estate, heir, beneficiary, administrator, or executor of any of the entities and persons described in (i), (ii), (iii), (iv) or (v) above, on any and all past, present, and future claims, actions, causes of action, rights or liabilities, known or unknown, based on, arising out of, or in any way relating or pertaining to (1) the escrow provisions of any mortgage contract that BancBoston uses in connection with the escrowed mortgage loans that it services or subservices; (2) BancBoston's methodology and formula for calculating and accumulating escrow deposits; (3) BancBoston's collection, accumulation, handling, custody, control, or use of the escrow funds accumulated as a result of the methodology and formula referred to in subparagraph (2) above, whether as trustee or otherwise; or (4) any of the events, statements, or allegations contained in plaintiffs' complaint, as amended. However, nothing within this decree shall release the following future individual claims: (a) late charge claims; (b) disputes over receipts of payments; (c) failure to make escrow disbursements in the name of the payee when payment has been received from the payee; (d) procurement of insurance; and

(e) ARM adjustments. This recital of exclusion of claims is in no way meant to suggest that such claims exist. Without limiting the generality of the foregoing, the released claims include all claims, actions, rights or causes of action arising under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"), regulations promulgated pursuant to RESPA, the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, Regulation Z, 12 C.F.R. § 226.1 *et seq.*, Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Parts 1-111 (1993), all state statutes prohibiting consumer fraud and/or unfair or deceptive trade practices of all states wherein class members reside, or the common law. Further, without limiting the generality of the foregoing, the released claims include all claims and causes of action that have been brought, or could have been brought, in this case, entitled *Hoffman, et al. v. BancBoston Mortgage Corp., et al.*, CV-91-1880, currently pending in the Circuit Court of Mobile County, Alabama, and the case of *Tatelman, et al. v. BancBoston Mortgage Corp., et al.*, Case Number 93-3411, currently pending in the Superior Court Department of the Trial Court of Suffolk County, Massachusetts.

18. Defendants believe that the practices used by BancBoston Mortgage Corporation to calculate and accumulate escrow deposits comply with all federal and state laws, have been explicitly approved by HUD, and are used throughout the mortgage banking industry. Therefore, neither the negotiation, execution nor entry of this Consent Decree shall constitute an acknowledgment or admission of liability in any amount by defendants.

19. The effective date of the Consent Decree is fourteen (14) days after the Decree has been finally approved by a court order which is final, unappealable or otherwise unreviewable.

20. The Court retains jurisdiction of this action for the purpose of issuing any and all orders or decrees as may be necessary to effectuate, clarify, modify, or enforce the purpose, intent and terms of this Consent Decree.

DONE this 24th day of January, 1994.

/s/
Circuit Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
MAR 28 1997
CLERK

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH, III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF NEW HAMPSHIRE, VERMONT, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, MAINE, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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II. Does the *Rooker-Feldman* Doctrine Bar Federal Courts from Hearing the Claims of State Court Class Action Members that their Former Class Counsel and Others Committed Fraud, Malpractice and Breach of Fiduciary Duties Against Them, Where Those Claims do not Collaterally Challenge the Validity of any Prior State Court Judgment?

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INTEREST OF THE AMICI CURIAE

The States of New Hampshire, Vermont, Arizona, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania and Wyoming ("the States" or "the amici States"), acting through their Attorneys General and pursuant to Supreme Court Rule 37, submit this brief in support of the Petitioners.[1]

The States seek to protect important due process rights of their citizens to obtain redress for injuries from class counsel and others for negotiating and obtaining approval of a foreign state court of a settlement alleged to have deprived class members of property without jurisdictional basis or the minimum due process protections established by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Class actions are peculiarly vulnerable to abuse through devices which subordinate the interests of absent class members to the interests of others, including class counsel.[2] The amici States are acutely concerned over what

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[1] Of the participating States, all except Hawaii are represented by their Attorneys General. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's Office, but is statutorily authorized to undertake consumer protection functions, including legal representation of the state.

[2] The potential for abuses in class action litigation has been well documented in both the case law and the literature. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litigation*, 55 F.3d 768, 787 (3d Cir. 1995), *cert. denied sub nom. General Motors Corp. v. French*, 116 S.Ct. 88 (1995) (vacating district court's orders certifying settlement class and approving settlement; "[W]ith less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the

expense of absentees), and other abuses"); *id.* at 803 (expressing concern that "counsel may have pursued a deal with the defendants separate from, and perhaps competing for the defendant's resources"); *In re Asbestos Litigation,* 90 F.3d 963, 993-1026 (5th Cir. 1996) (Smith, J., dissenting) *petition for cert. filed* (Mar. 3, 1997) (No. 96-1394); *In re Ford Motor Co. Bronco II Prods Liab. Litigation,* 1995 U.S. Dist. LEXIS 3507, at 28-29, 32 (E.D. La., Mar. 15, 1995) (rejecting proposed settlement of multidistrict litigation, noting that "[n]ot only are the terms of the proposed settlement inadequate, but there is evidence that class counsel's representation was also inadequate" and that the proposed settlement "could possibly be the result of collusion between the defendant and class counsel"); RICHARD POSNER, AN ECONOMIC ANALYSIS OF LAW 570 (4th ed. 1992) (no one has stake in size of class action judgment except defendant, who has interest in minimizing it; class counsel will be tempted to offer to settle with defendant for small judgment and large fee; and lawyers largely control access to information by court, which is charged with approving settlement); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 COLUM. L. REV. 1343 (1995); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion,* 80 CORNELL L. REV. 851, 851 (1995) ("[I]t is increasingly the corporate defendant that wishes to be sued in a class action and--with the help of a friendly plaintiffs' attorney--that often actively arranges for such a suit to be brought by a nominal plaintiff."); John C. Coffee, Jr., *Rethinking the Class Action,* 62 IND. L.J. 625, 628-29 (1987) (describing potential for conflicts of interest in class action litigation in terms of "agency costs"); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction,* 80 CORNELL L. REV. 811, 813 (1995); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. LEGAL STUD. 47, 61 (1975) (coining phrase "lawyer-entrepreneur" to describe class counsel); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.,* 80 CORNELL L. REV. 1045 (1995); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There,* 9 GEO. J. LEGAL ETHICS 1, 13 (1995); Jonathan R. Macy & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation,* 58 U. CHI. L. REV. 1, 7-8 (1991) (class counsel not subject to monitoring by class, operating "largely according to their own self-interest"); John Leubsdorf, *Co-opting the Class Action,* 80 CORNELL L. REV. 1222, 1225 (1995) (describing "third stage of concern" about class actions as "mov[ing] beyond a focus on the temptations of class counsel to an analysis of how those opposing the class--that is, defendants and their lawyers--can

is widely perceived as an escalating pattern of problematic class action settlements with potentially prejudicial effects on our citizens.[3] This case involves a particularly egregious situation in which Petitioners -- absent members affected by an allegedly abusive class action settlement -- have been deprived by the decision below of adequate recourse to assert their claim that they have been deprived of property without due process of law or have been the victims of fraud or

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manipulate those temptations for their own benefit"); Kurt Eichenwald, *Class-Action Suit Deadline Expired, Prudential Argues,* N.Y. TIMES, Dec. 11, 1995, at D2; Kurt Eichenwald, *Lawyers Receiving $22.6 Million of Prudential Settlement,* N.Y. TIMES, May 20, 1994, at D2; Kurt Eichenwald, *Millions for Us. Pennies for You,* N.Y. TIMES, DEC. 19, 1993, at § 3, 1; Diana B. Henriques, *High Court Hands Corporations Victory on Class-Action Suits,* N.Y. TIMES, Feb. 28, 1996, at D1; Brenda N. Leer, *Thanks to Lawyers, I'm 93 Cents Richer,* SAN DIEGO UNION-TRIBUNE, July 14, 1996, at G3; Barry Meier, *Fistfuls of Coupons,* N.Y. TIMES, May 26, 1995, at D1; Scot J. Paltrow, *Lawyers to Get 25% of Prudential Class-Action Settlement; Securities: Judge Apparently Ignores Complaints from SEC and California Officials that the Fee Requests Were Excessive,* L.A. TIMES, May 20, 1994, at D1; David Phelps, *Attorneys Who Get Paid in Cash Irk Clients Who Get Paid in Scrip,* STAR TRIBUNE, April 17, 1994, at 4D; Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit,* WALL ST. J., July 18, 1996, at A1; Lawrence W. Schonbrun, *How Public Can Stop Class-Action Racket,* S.F. CHRON., Oct. 18, 1993, at B3; Kathy Walt, *Truck Lawsuit Shifts into Reverse; Attorney Fees Issues Cited in Ruling,* THE HOUSTON CHRONICLE, Feb. 10, 1996, at Business, 1; Vaughn R. Walker, *Class-Action Suits Overdue for Fee Reform,* SACRAMENTO BEE, June 6, 1993, at B7; Bernard Weinstein, *Class Action Filings; Often Are Lawsuit Abuse,* DALLAS MORNING NEWS, July 28, 1996, at 6J.

[3] Certain of the amici and other States have already filed briefs with the Court this term calling into question two other class settlements where notice to the class and representation of the class were alleged to have been constitutionally inadequate. *See* Brief for the States of New York, Vermont, etc., in *Adams v. Robertson*, No. 95-1873; and Brief for the States of New York, California, etc., in *Amchem Products, Inc. v. Windsor*, No. 96-270.

malpractice by persons who stood in a fiduciary or other special relationship to them.

Accordingly, the amici States, as parens patriae, appear as advocates for the availability of an effective, but nonduplicative vehicle for enforcing the procedural rights of absent class members articulated in *Phillips Petroleum Co. v. Shutts*, and for the availability of an effective local forum in which absent class members might raise separate and *bona fide* claims of fraud or malpractice against the class' legal counsel or others.

STATEMENT OF THE CASE

This case arises in the wake of *Hoffman v. BancBoston Mortgage Corp.*,[4] No. CV-91-1880 (Mobile Cty., Ala. 1993), a nationwide class action which has been widely criticized as a grotesque abuse of the class action process.[5] The *Hoffman* action was filed against Bank of Boston Corporation and BancBoston Mortgage Corporation (hereinafter collectively "the Bank") for holding excess mortgage escrow amounts in the accounts of over 700,000 mortgagors. Following the granting of partial summary judgment in the plaintiff class' favor, a settlement was proposed to and approved by the Alabama court in January 1993. The settlement provided for a 19% reduction in the

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[4] In all references to *Hoffman v. BancBoston Mortgage Corp.*, the States accept as true the well-pled allegations contained in Petitioners' initial Complaint in the district court, which is contained in the Appendix to the Petition for Writ of Certiorari (hereinafter "A") at 49-105.

[5] *See, e.g.*, Barry Meier, *Math of a Class Action: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1; John C. Coffee, Jr., & Susan P. Koniak, *The Latest Class Action Scam*, WALL ST. J., Dec. 27, 1995, at A-11; Jane Bryant Quinn, *Fighting the System, Everywhere*, NEWSWEEK, Oct. 2, 1995, at 71; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).

amount of escrow funds that could be held; a one-time interest payment to each class member of between $0 and $8.76; and a refund of the excess escrow funds in each account prior to the termination of the mortgage, from which attorney's fees would be deducted. A-77. Rather than basing the amount of attorney's fees on the actual economic benefit to the class members (that is, on the value of having earlier access to any excess escrow funds), the settlement provided for fees calculated as a percentage of *the total of excess escrow funds themselves*--money which had always belonged to the class. *See* A-79. These fees amounted to at least $8.5 million of the account-holders' own money. *See* A-4.

As class members in *Hoffman*, Petitioners received a Notice of Settlement, approved by the Alabama court, which stated that the settlement was "fair," that the attorney's fees were "reasonable," and would not exceed one-third of the "economic benefit" to the class. In fact, Petitioners allege, the notice was deceptive in that class counsel and the Bank knew that most, if not all, class members would suffer a *net out-of-pocket loss* as a result of the settlement. A-70-73. Petitioners further allege that this settlement was agreed upon in negotiations between class counsel and the Bank, and that its terms permitted class counsel to obtain from the escrow accounts of Petitioners and other class members millions of dollars in attorney's fees. In support of this allegation, Petitioners claim that class counsel rejected a prior settlement offer by the Bank under which the class would have received the same relief as it did under the settlement as ultimately agreed upon, but the Bank (not the class members) would have paid a lesser amount in attorney's fees. A-74-76. Petitioners also allege that the Bank subsequently attempted to disguise the true nature of the attorney's fee deduction in 1994 Annual Tax and Interest Statements to its mortgagees by deceptively labeling the deduction as a "miscellaneous disbursement." A-88-89.

Petitioners filed suit in the United States District Court for the Northern District of Illinois, asserting claims under RICO, 42 U.S.C. §1983 and various common law theories, including fraud, fraudulent concealment, negligent misrepresentation, and conversion; attorney malpractice against class counsel; and breach of fiduciary duty against class counsel and the Bank. The district court, reasoning that the Petitioners' claims constituted a collateral attack on a settled state court judgment, dismissed all counts under the *Rooker-Feldman* doctrine. A-17-34. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).[6] According to the district court, Petitioners' sole avenue for redress of any alleged wrong arising out of *Hoffman* was to file an action in the Alabama court which originally approved that settlement, seeking to have the judgment set aside as fraudulently obtained.

A three-judge panel of the Court of Appeals for the Seventh Circuit acknowledged the "superficially egregious" facts of the case, but affirmed the district court's decision. 92 F.3d 506, 512 (7th Cir. 1996)[7] Rehearing en banc was denied. However, five judges of the Seventh Circuit panel

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[6] The *Rooker-Feldman* doctrine derives from 28 U.S.C. § 1257, which vests this Court with exclusive federal jurisdiction to review final judgments of state courts and bars "direct review in the lower federal courts of a decision reached by the highest state court..." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989); *see also Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994) (*Rooker-Feldman* bars "party losing in state court ... from seeking what in substance would be appellate review of the state court judgment in a United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.")

[7] The Court of Appeals commented, "We won't deny that the Alabama judgment seems questionable on the surface. How can it be right that a plaintiff should recover less than $10 and have to pay nearly $100 in fees?" 92 F.3d at 511.

dissented from the denial and, in an opinion authored by Judge Easterbrook, reasoned that *Rooker-Feldman* should not be applied to bar Petitioners from proceeding with their claims in federal court. 100 F.3d 1348, 1351-52 (7th Cir. 1996).

SUMMARY OF ARGUMENT

The lower courts' refusal to consider Petitioners' jurisdictional and due process arguments before dismissing their action on *Rooker-Feldman* grounds directly conflicts with this Court's constitutional jurisprudence and with decisions of other Circuits, and has resulted in such a departure from the accepted course of judicial proceedings as to warrant the exercise of this Court's power of supervision. *See* Supreme Court Rule 10.1(a) (c).

The *Rooker-Feldman* doctrine properly bars collateral challenge in federal court to valid state court judgments. It does not apply to the claims presented by Petitioners for two reasons. First, Petitioners challenge the very jurisdiction of the Alabama state court whose judgment in *Hoffman* cast them in the role of defendants and deprived them of property without complying with the minimum contacts standard for due process established by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and on the grounds that their class action notice and representation were inadequate to confer jurisdiction under *Phillips Petroleum Co. v. Shutts*. Whenever such fundamental due process claims are raised, they must be heard, and jurisdiction found in the state court, before the *Rooker-Feldman* bar can be considered.

Second, Petitioners' claims against the Bank and former class counsel are essentially for breach of fiduciary duty and malpractice, which are independent of and do not require relitigation of any issue concluded in *Hoffman*.

Recent decisions of the Ninth and Eleventh Circuits and precedent from the Third Circuit all support the ability of parties like Petitioners to prosecute such independent claims against class counsel, notwithstanding *Rooker-Feldman*. The Seventh Circuit, embracing the reasoning of earlier decisions by the Fifth and Sixth Circuits, has exacerbated a conflict among the circuits. The Court should grant the requested writ of certiorari to settle a circuit conflict and to establish that *Rooker-Feldman* should not be extended to bar actions to enforce the independent rights of class members to insist on fair and adequate representation by their counsel. *See* Supreme Court Rule 10.1(a)

ARGUMENT

I. THE *ROOKER-FELDMAN* DOCTRINE SHOULD NOT APPLY TO CLAIMS BY CLASS MEMBERS ARISING FROM A STATE COURT CLASS ACTION SETTLEMENT WHERE THE STATE COURT LACKED PERSONAL JURISDICTION OVER ABSENT CLASS MEMBERS.

A. The Decision Below Cannot Be Reconciled With the Long-standing "Minimum Contacts" Rule Established by *International Shoe Co. v. Washington.*

The courts below invoked *Rooker-Feldman* to dismiss Petitioners' action based on the premise that the *Hoffman* class members were functionally made defendants with respect to the attorney's fee award in that action, and that the judgment of the Alabama state court "against them" was valid. 92 F.3d at 511-12. But *Rooker* itself was a case in which this Court recognized that "indubitably there was full jurisdiction in the state courts." *See Rooker,* 263 U.S. at 416.

As the facts of this case demonstrate, *Rooker-Feldman* simply cannot not apply where the state court judgment is void for lack of personal jurisdiction. Moreover, the consequences of extending *Rooker-Feldman* to bar *bona-fide* jurisdictional challenges to state court class action judgments should outweigh any concerns of comity or judicial economy from allowing such cases to be heard in federal forums.

It is a fundamental principle of American jurisprudence that no court may impose duties or obligations on persons over whom it has no basis for personal jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714 (1877). Judgments rendered without personal jurisdiction are not entitled to full faith and credit under the United States Constitution and cannot be enforced against the person or property of an absent party without due process of law. *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). This principle should not materially differ in cases where the judgment is applied to a class action plaintiff who has been treated as a defendant by the trial court.

The seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) holds that the due process clause absolutely forbids states from entering binding judgments against persons with whom the states have no contacts, ties or relations. 326 U.S. at 319. States may only force out-of-state defendants to defend themselves in, and bind them to a judgment of, a state court if the defendants possess minimum contacts with the state such that it is "reasonable and just, according to our traditional conception of fair play and substantial justice," for the state to exercise personal jurisdiction. 326 U.S. at 320.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1965) emphasizes the continuing vitality of *International Shoe* in the context of class actions. While holding that as long as certain procedural safeguards are satisfied, states could

exercise jurisdiction even over the claims of absent plaintiffs who lack minimum contacts with the forum, 472 U.S. at 806-14, the Court observed that this holding did not necessarily govern non-typical class actions where, as here, absent class members might be subjected to burdens ordinarily imposed on defendants. 472 U.S. at 810 n.2 and 811 n.3.[8]

The basis for this exception is clear from the factual circumstances to which this Court limited its holding in *Shutts*. According to *Shutts*, personal jurisdiction could be exercised over the claims of absent plaintiff class members because the judgment, even if adverse, would not "typically bind an absent plaintiff for any damages," 472 U.S. at 810, or force absent class members "to comply with some other form of remedy imposed by the court," including "liability for court costs and attorney's fees." 472 U.S. at 808. Moreover, absent class members typically do not need to hire counsel, are not subject to counterclaims or cross-claims or liability for fees and costs, and are not subject to coercive or punitive remedies. 472 U.S. at 810 & n.2.

The Alabama judgment at issue in this case is precisely the non-typical class action judgment excepted by *Shutts*. The *Hoffman* class members were effectively forced to respond in damages and to comply with the remedy imposed by the court, by having exorbitant attorney's fees deducted from their own escrow funds, thereby destroying any putative benefit arising from the judgment. Unlike the truly plaintiff class in *Shutts*, where absent class members could be properly bound to the relief granted by the forum court, the *Hoffman* class was transposed by the confiscatory settlement negotiated by the parties into a defendant class in

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[8] The Court also stated that its discussion of personal jurisdiction did not, "of course, . . . address class actions where the jurisdiction is asserted against a defendant class." 472 U.S. at 811 n.3.

all but name, whose property was taken without due process of law.

As a result, *International Shoe* applies to the case at bar and, on the facts as pled, most absent class members had no meaningful contacts with the State of Alabama before the *Hoffman* court entered its judgment. Indeed, the only common tie of the class members to the forum state was that they all had mortgage accounts with a company which itself had few meaningful ties to Alabama beyond having issued at least one mortgage to an Alabama citizen. Thus, the Alabama court had no right to impose "liability" on them. The judgment was a nullity, and this action cannot be considered an attempt to "appeal" that judgment, which might invoke the *Rooker-Feldman* doctrine.[9]

Significantly, the Seventh Circuit never undertook any considered analysis of this jurisdictional deficiency. The court's only response to the claimed lack of jurisdiction of the Alabama court was that "[e]ven if we were to accept the argument [that issues of personal jurisdiction must be addressed], it does not change the fact that lower federal courts cannot review decisions of the state court." 92 F.3d at 512.

This abdication of responsibility for meaningfully inquiring into the claimed jurisdictional defects in *Hoffman* improperly denied Petitioners access to the federal courts.

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[9] The need for state court jurisdiction to trigger the application of *Rooker-Feldman* is no different from the need for initial state jurisdiction before one state court will give full faith and credit to the decision of another state court. *See, e.g., Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Assn.*, 455 U.S. 691, 704 (1982); *Nevada v. Hall*, 440 U.S. 410, 421 (1979), *rehearing denied*, 441 U.S. 917 (1979); *Heiser v. Woodruff*, 327 U.S. 726, 736 (1946), *rehearing denied*, 328 U.S. 879 (1946); and *Matter of Brady, Texas, Municipal Gas Corp.*, 936 F.2d 212, 218 (5th Cir. 1991), *cert. denied sub nom. Sanders v. City of Brady, Texas*, 502 U.S. 1013 (1991).

The Seventh Circuit's expansive interpretation of *Rooker-Feldman* requires citizens to pursue direct appeals of adverse judgments entered by state courts having no plausible claim of jurisdiction and limits their recourse to the federal courts to the possibility that this Court might grant certiorari review of the original judgment. Our legal system traditionally permits citizens to ignore invalid judgments or to assert lack of jurisdiction in an appropriate forum if someone seeks to enforce that invalid judgment. Similarly, Petitioners should not be barred by a jurisdictionally invalid judgment from asserting claims against class counsel and the Bank. *Rooker-Feldman* should not be expanded to eliminate such appropriate means of asserting valuable due process rights.[10]

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[10] The erroneous nature of the decision below would be apparent had the *Hoffman* court required Petitioners to pay their own attorneys from funds held by Petitioners themselves. Any attempt by class counsel to enforce that judgment in the courts of Petitioners' home states could be contested on the grounds that the Alabama court had no jurisdiction over Petitioners. *See Hansberry v. Lee*, 311 U.S. at 40-41 (1940). Were it not for the fact that the *Hoffman* bank defendants had possession of the absent plaintiffs' monies and therefore were able to deduct those funds from Petitioners' escrow accounts without first seeking permission from a court of competent jurisdiction, Petitioners could have resisted any attempt to enforce the Alabama judgment in their own state courts or in any other court. Petitioners would also have been free to assert the fraud alleged in their complaint. That fortuity cannot, consistent with the United States Constitution, be used to undermine Petitioners' due process rights.

B. The Court Below Ignored Petitioners' Claim That the Class Notice and Representation in *Hoffman* Were Constitutionally Inadequate to Confer Jurisdiction Over Them.

A state court may exercise personal jurisdiction over a non-resident class member only if the class member is provided with (1) notice which is "the best practicable" and "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"; (2) "an opportunity to remove [themselves] from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court"; and (3) "an opportunity to be heard and participate in the litigation, whether in person or through counsel." *Phillips Petroleum Co. v. Shutts,* 472 U.S. at 812.

A notice that fundamentally misstates plaintiffs' rights and burdens is not constitutionally sufficient to support the exercise of jurisdiction over out-of-state class members. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957-58 (Tex. 1996), *aff'd.* 916 S.W.2d 949 (1996) (class action settlement properly set aside because class members did not receive adequate notice of projected amount of attorney's fees and expenses); *see also Ford Bronco Litig.,* 1995 U.S. Dist. LEXIS 3507 at *31 (class denied adequate information on attorney's fees).

Adequate notice is also a precondition to a second aspect of due process that inheres in class actions primarily involving money judgments: the right to opt out of the class. *Shutts,* 472 U.S. at 811. Without clear and accurate information on the impact of the litigation, class members cannot make an informed decision as to whether to opt out or otherwise object. *Cf. Haring v. Prosise,* 462 U.S. 306, 313 (1983) (state court judgment will not collaterally estop

subsequent federal court action where party against whom earlier decision is asserted did not have full and fair opportunity to litigate claim or issue decided by first court).

Nor may courts constitutionally exercise jurisdiction over absent class members unless the named plaintiff "at all times adequately represents the interests of the absent class members." 472 U.S. at 812 (citing *Hansberry v. Lee*, 311 U.S. at 42-43); *Martin v. Wilks*, 490 U.S 755, 762 n.2 (1989) (recognizing exception to general rule that non-parties are not bound by court judgment when, in certain limited circumstances, non-party "has his interests adequately represented by someone with the same interests who is a party.") The Court recently reaffirmed this requirement in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761, 1766 (1996); *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 890 (1996) (Ginsburg, J., concurring) (stressing "centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement.")[11]

This requirement of adequate representation extends to class counsel as well as to the named class representatives. *See GM Pick-up Litig.*, 55 F.3d at 801; *VMS Limited Partnership Securities Litig.*, 1994 U.S. Dist. LEXIS 90 at *6-*8 (N.D. Ill. 1994); *Lewis v. Philip Morris, Inc.*, 419 F. Supp. 345, 352 (E.D. Va. 1976).

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[11] *Accord Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973) (class action judgment limiting retroactive relief to named plaintiff held not to bind other class members where named plaintiff did not appeal judgment on behalf of class; due process requirement of adequate representation cited as exception to general rule that class action judgment binds absent class members). According to the *Gonzales* court, "the primary criterion for determining whether the class representative has adequately represented the class for purposes of res judicata is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class." 474 F.2d at 74.

Petitioners allege that the notice sent to the class affirmatively misrepresented the impact the settlement would have on class members. A-82-85. While the notice stated that attorney's fees would not exceed one-third of the "economic benefit" conferred on the class, that term was not defined and was actually applied in a manner which caused many class members to lose more than they gained.[12] Notice which is affirmatively misleading in some material respect is not adequate.

In addition, Petitioners challenge the adequacy of the class representation in *Hoffman*, alleging that class counsel, through malfeasance, conflict of interest and collusion with the defendants, utterly failed to represent their interests in the prior litigation, and actually worked to their own clients' detriment. In particular, the allegations of collusion between class counsel and the Bank in connection with the *Hoffman* settlement raise legitimate questions of fact regarding the adequacy of class counsel's representation of the class and the consequent binding effect of that settlement on absent class members which may properly be raised in a forum other than the original situs of the class action. *See In re Real Estate Antitrust Litigation*, 869 F.2d 760, 769 (3d Cir. 1989), *cert. denied sub nom. Chicago Title Insurance Co. v. Tucson Unified School Dist.*, 493 U.S. 821 (1989) ("Ever since *Hansberry v. Lee* was decided in 1940, collateral

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[12] Although the Alabama court approved the notice, it was not asked to decide, nor did it consider, whether the notice contained a false statement of material fact, because defendants controlled the information brought before the court. These are the same circumstances which greatly concerned the Court of Appeals for the Third Circuit in *G.M. Pickup Litig.*, 55 F.3d at 787-88, where a settlement class created especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members because they were not adequately informed about the substance of the action.

attacks have been considered to be a necessary part of the class action rule.")

The Seventh Circuit's expansion of *Rooker-Feldman* denies a federal forum to citizens caught in deceptively abusive class actions originating in a state courts with no colorable claim of jurisdiction over them. Such a result is irreconcilable with the basic premise of *Shutts*.[13] Indeed, it is to preserve the integrity of the class action remedy that state court class action judgments -- particularly those that arise from settlement -- must remain vulnerable to collateral attack if they fail to satisfy the constitutional requirements of adequate notice and representation. *See Matsushita,* 116 S. Ct. at 888 (Ginsburg, J., concurring) ("[a] court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action.")[14]

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[13] The Seventh Circuit's view that Petitioners must bring their claim before the Alabama state court is also misplaced, not only because the Alabama court arguably never had and could not exercise jurisdiction over them, but also because plaintiffs are entitled to seek redress in the forum of their choice. *See Firstsouth, F.A. v. LaSalle National Bank*, 1991 U.S. Dist. LEXIS 13139 (N.D. Ill. 1991); *Borock v. Shidler Group*, 1990 U.S. Dist. LEXIS 14619 (N.D. Ill. 1990). *But see Deboer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995), *cert. denied* 116 S.Ct. 1544 (1996) (objector's submission to class action court's jurisdiction vitiates any due process challenge under *Shutts*).

[14] *See also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982) ("A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.")

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS BY ESTABLISHING THAT *ROOKER-FELDMAN* DOES NOT BAR FEDERAL COURTS FROM HEARING INDEPENDENT FRAUD AND MALPRACTICE CLAIMS OF STATE COURT CLASS ACTION MEMBERS.

Even assuming that the Alabama court had personal jurisdiction over plaintiffs in *Hoffman*, Petitioners' action against their former counsel and the Bank was improperly dismissed under *Rooker-Feldman* because those claims - sounding essentially in fraud and malpractice - are factually independent of the *Hoffman* judgment. They do not require relitigation or reopening of any issue resolved in that case. This distinction (and its implication for future litigation) was clearly recognized by the dissenting judges below:

> If the *Rooker-Feldman* doctrine applies to suits by the absent class members because a malpractice action is a collateral attack on the order approving settlement and awarding attorneys' fees, then the law of preclusion (res judicata) should bar malpractice actions in any court, state or federal, and without regard to which judicial system handled the first case. Yet no one thinks that. *A malpractice suit is an independent action.*

A-48 (emphasis added).[15]

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[15] The reasoning of the dissenting judges is consistent with a prior decision of the Seventh Circuit, which recognized that *Rooker-Feldman* does not deprive a federal court of jurisdiction over a claim that alleges impropriety in the procurement of a prior state court decision. *Nesses v. Shepard,* 68 F.3d 1003, 1004 (7th Cir. 1995). *See also Derrickson v. City of Danville, Ill.,* 845 F.2d 715, 723 (7th Cir. 1988) (allowing state criminal prosecution of city commissioners for conflict of interest in manner of negotiating consent decree settling voting rights case in federal court, and distinguishing same from challenge to terms of

Both the Ninth and Eleventh Circuits have recently applied this rationale to permit class members to bring actions for attorney malpractice against their class counsel for alleged malfeasance in connection with a duly approved class action settlement. *Durkin v. Shea & Gould*, 92 F.3d 1510, 1513 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3611 (Feb. 24, 1997) (No. 96-1364) (quoting district court's ruling that "prior adjudication of a settlement's adequacy does not collaterally estop a legal malpractice claim challenging the conduct of a party's attorney during the prior action"); *Bennett v. Gen-Probe, Inc.*, 87 F.3d 1317 (Table), No. 95-55306, 1996 U.S. App. LEXIS 16541 at *3-4 (9th Cir. June 14, 1996), *cert. denied*, 117 S.Ct. 943 (1997). *See also Diaz v. Sheppard*, 85 F.3d 1502, 1506 n.2 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3468 (U.S. Dec. 20, 1996) (No. 96-1004). Precedent from the Third Circuit also supports this view. *See Zimmer Paper Products, Inc. v. Berger & Montague*, 758 F.2d 86 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985).

On the other hand, two Circuits have held to the contrary. *See Adams Extract Co. v. Pleasure Hours, Inc. (In Re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); *Laskey v. UAW*, 638 F.2d 954 (6th Cir. 1981).

The reasoning of the Third, Ninth and Eleventh Circuits and of the dissenting judges below should control this Court's resolution of the conflict among the circuits for two reasons. As Judge Easterbrook noted, the Seventh Circuit's holding that a malpractice claim against class counsel is barred by *Rooker-Feldman* necessarily translates

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decree itself); *In re VMS Securities Litigation*, 156 F.R.D. 635, 639-40 (N.D. Ill. 1994) (court-approved class action settlement did not preclude subsequent state court action against defendant securities firm for fraudulently causing class members to fail to opt out of original class).

into a bar against any malpractice action arising from that action. 100 F.3d at 1352-53. Clearly, a malpractice claim arising out of an ordinary judgment is not barred by any preclusive effect of the judgment. *See* 100 F.3d at 1353. Yet the Seventh Circuit would grant the Alabama court's fairness hearing precisely that preclusive effect in the context of a class action settlement. In effect, the Seventh Circuit has barred Petitioners from asserting independent claims against their lawyers and the Bank based on the preclusive effect of a judgment by a court which arguably had no jurisdiction over them in the first place. Such a result is both absurd and unfair and compounds the injustice which Petitioners attribute to the *Hoffman* judgment.

Second, the position of the Third, Ninth and Eleventh Circuits is appropriately responsive to the growing concern over abuse of the class action process by attorneys and others. *See supra* at n. 2. While class actions are useful vehicles for the resolution of issues affecting large numbers of injured parties, persons negotiating class action settlements must remain accountable to class members. The ruling below insulates class counsel from any scrutiny beyond that accorded in a Rule 23 fairness hearing. That result improperly denies absent class members the right to seek redress against counsel or others for incompetence, abuse, or collusive settlement practices notwithstanding the resolution of any underlying action. *See* 100 F.3d at 1351. *See also Durkin v. Shea & Gould*, 92 F.3d at 1518 (quoting *Ruffalo v. Patterson*, 234 Cal. App. 3d 341, 343, 285 Cal. Rptr. 647, 648 (1991)) (to hold malpractice claim barred by court-approved settlement "would be to rule that where an attorney's negligence has caused a court to make an erroneous adjudication of an issue, the fact that a court has made that adjudication absolves the attorney of all accountability and responsibility for his negligence.")

In light of the existing split in the circuit courts' precedent over whether *Rooker-Feldman* closes the federal courthouse door to the citizens of our States, and the persuasive reasons for keeping that door open, this Court should grant certiorari to establish that persons who claim to have been victimized by class counsel and others through a collusive class settlement may bring an action in federal court against the parties alleged to have wronged them, notwithstanding *Rooker-Feldman*.

CONCLUSION

The ruling below ignores the jurisdictional defects of the Alabama judgment and improperly denies absent class members access to the federal courts. Such a result is both unjust and unsupported by the precedent of this Court. Therefore, the amici States urge the Court to grant certiorari for the purpose of reviewing and reversing the decision below.

Dated: March 20, 1997

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In The

Supreme Court of the United States

October Term, 1996

DEXTER J. KAMILEWICZ, *et al.*,

Petitioners,

vs.

BANK OF BOSTON CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE LAW TEACHERS IN SUPPORT OF PETITION AND MOTION FOR LEAVE TO APPEAL

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22 pp

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to this Court's Rules 21 and 37, the law teachers listed in the Statement of Interest below move for leave to file the following brief in support of the petition for certiorari in this case. Consent to the filing of this brief has been obtained from the Petitioners and from Respondents Bank of Boston Corporation, Bancboston Mortgage Corporation, Burr & Forman, and T. Thomas Cottingham, but not from the other Respondents. The *amici* set forth their interests and reasons for seeking to file this brief in the Statement of Interest below.

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STATEMENT OF INTEREST

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We urge the Court to hear this case because of the large and undesirable changes that the decision below effected, not only in the *Rooker-Feldman* doctrine, but also in the law of personal jurisdiction, class actions, and res judicata. Although this brief will focus on the unusual importance of the issue presented for review, we also believe that the result below was erroneous, for substantially the reasons stated in the dissent of Judge Easterbrook (joined by four other judges) from denial of rehearing *en banc*.

Although only the *Rooker-Feldman* ground on which the lower courts relied is now before this Court, we also believe that the Petitioners have set forth substantial claims on the other issues in this case. These claims include those that: (a) the Respondents committed actionable wrongs; (b) the Alabama court that approved settlement of the *Hoffman* class action lacked personal jurisdiction over Petitioners because they lacked contacts with Alabama, because the settlement subjected their mortgage accounts to a net disbursement and thus failed to bring the case within *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and because they did not receive constitutionally adequate notice of that; (c) the Petitioners are not bound by that class action settlement because they received no constitutionally adequate representation or notice; and (d) Alabama res judicata law, applicable in federal court under 28 U.S.C. § 1738, does not bar this action. We therefore urge that this Court review the lower Court's judgment.

ARGUMENT

The Seventh Circuit panel's expansion of the *Rooker-Feldman* doctrine to cover this case disrupts not only that doctrine but also interrelated doctrines governing the effect of civil judgments. In effect, the Court held that federal courts may not hear an action charging class action lawyers and others with malpractice, fraud and other misconduct because this would

amount to a federal "appeal" from a state court order approving the class action settlement and the lawyers' fee award, even if that order was reached without personal jurisdiction over the federal plaintiffs, and without their interests having been properly represented. The result will be to eliminate several traditionally recognized grounds for collateral attack on unconstitutionally grounded judgments, and to create what amounts to a broad, federal-judge-made system of res judicata for the effect of state court judgments in federal courts, in violation of 28 U.S.C. § 1738.

1. The decision below conflicts with the traditional rule that a party is not bound by a judgment entered without personal jurisdiction when that party did not participate in the challenged proceedings. It has long been settled, of course, that judgments reached without personal jurisdiction are not entitled to full faith and credit in other courts,[1] including federal courts.[2]

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[1]*E.g.*, Underwriters Nat'l Assur. Co. v. N.C. Life Ins. Guaranty Ass'n, 455 U.S. 691, 704-05 (1982); Hanson v. Denckla, 357 U.S. 235, 255-56 (1958); Flexner v. Farson, 248 U.S. 289 (1919); Nat'l Exchange Bank v. Wiley, 199 U.S. 257 (1904); Bell v. Bell, 181 U.S. 175 (1901); D'Arcy v. Ketchum, 52 U.S. 165 (1851); Restatement, Second, Judgments § 81.

[2]*E.g.*, Durfee v. Duke, 375 U.S. 106 (1963); Pennoyer v. Neff, 95 U.S. 714 (1878); Hall v. Lanning, 91 U.S. 160 (1875); Knowles v. Gaslight & Coke Co., 86 U.S. 58 (1873); Thompson

The Court below, however, concluded that the *Rooker-Feldman* doctrine forbids federal collateral attack (which it construed this case to be) even by parties who never appeared in state court on state court judgments rendered without personal jurisdiction.

Although the lower court's holding applies only to federal courts, it would nevertheless bar collateral attack in many cases. A plaintiff who has obtained a state court judgment without jurisdiction over the defendant need only bring an action to enforce that judgment in federal court. Under the decision below, *Rooker-Feldman* would then block the defendant's attempt to challenge the underlying judgment because the federal court would have no jurisdiction to adjudicate such a challenge. The same result could follow if the defendant in the original action filed a state court action collaterally attacking the original judgment and the other party were able to remove the case to federal court. In effect, federal courts would give full faith and credit to state court judgments lacking personal jurisdiction, and the traditional rule under which such judgments do not bind would apply only when the victimized defendant could somehow keep any challenge to the judgment out of federal court.

The only justification for such a result suggested by the Court below--that this case does not involve a default judgment--

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v. Whitman, 85 U.S. 457 (1873); *see* Simon v. Southern Ry., 236 U.S. 115 (1915)(defendant not served in state court suit may sue in federal court to enjoin enforcement of judgment).

misapprehends the reason for treating judgments without personal jurisdiction as nonbinding. The Petitioners in this case can challenge the personal jurisdiction of the Alabama court over them because *they* never appeared in the Alabama court, and are hence not bound by any decision that court rendered as to its own jurisdiction. It is irrelevant to the rights of these Petitioners that other class members may have appeared. This is like a case in which one of two defendants appeared in a state court but the other did not: the second defendant is clearly entitled to challenge the rendering court's personal jurisdiction over it. *E.g.*, Hall v. Lanning, 91 U.S. 160 (1875).

The Court's decision thus cuts back an opportunity for collateral attack that is one of the columns on which personal jurisdiction law rests. It is of little avail for this Court to declare that a defendant has a Constitutional right not to litigate a given dispute in an Alabama court, if that right can be asserted only by going to an Alabama court to raise a jurisdictional defense. Without the opportunity to contest the binding effect of a judgment, defendants will be forced to appear in unconstitutional forums--and some plaintiffs will be encouraged to press their choice of forum beyond Constitutional limits.

2. The decision below conflicts with the rule that a class member is not bound by a class action judgment in which the member received inadequate representation. Like the

personal jurisdiction rule, this one is grounded in the Due Process clause and is well established.[3] The right it confers can be exercised either in the original forum or in another.[4] Yet the Court declined even to consider the merits of Petitioners' claim of inadequate representation because doing so "would run directly into the state court finding, entered after a two-day fairness hearing--that the fees were reasonable." Of course, that is the very finding that the Petitioners claim denied them due process because the lawyers purporting to represent the class instead pursued their personal interests in obtaining an attorney fee so large that class members wound up with net losses.

The Court's decision thus bars collateral attack (which it considered this case to be) on a state court class action judgment whenever the party benefitting from the judgment can get the case into a federal court. For example, a plaintiff securing a judgment against a defendant class could then bring federal court

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[3]*E.g.*, Richards v. Jefferson County, 116 S. Ct. 1761 (1996); Hansberry v. Lee, 311 U.S. 32 (1940); Restatement, Second, Judgments § 42; *see* Kremer v. Chemical Construction Corp., 456 U.S. 461, 480-83 (1982).

[4]Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873, 888 (1996)(Ginsburg, J., concurring); Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), cert. dismissed, 511 U.S. 117 (1994); In re Real Estate Title & Settlement Services Antitrust Litigation, 474 F.2d 67 (3d Cir. 1989); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

enforcement actions against class members falling within diversity jurisdiction without fear of due process challenges.

The result is to undermine a vital safeguard for the integrity of class actions. Such actions constitute an exception to the usual principle that one can constitutionally be bound only by a judgment to which one is a party.[5] The exception is sound, but it does raise the possibility--realized in this case--that those participating in the action will misrepresent or abuse class members. For class actions to fulfill their important functions, class members must have a reasonable opportunity to keep the system honest by challenging the Constitutional adequacy of their representation.

3. The decision below stretches the *Rooker-Feldman* doctrine into a free-floating bar to federal actions involving allegations inconsistent with a state court finding. *Rooker-Feldman* has heretofore been a limited doctrine that prohibits a party to a state court judgment from bypassing this Court's appellate jurisdiction by seeking to overturn that judgment in a new

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[5]*E.g.*, Richards v. Jefferson County, 116 S. Ct. 1761 (1996); Hansberry v. Lee, 311 U.S. 32, 40 (1940); Postal Telegraph Cable Co. v. Newport, 247 U.S. 464 (1918); *see* Martin v. Wilks, 490 U.S. 755 (1989).

federal court action.[6] It has been based, not on some expansive policy, but simply on 28 U.S.C. § 1257, the statute that authorizes appellate review by this Court, and that contains no explicit language limiting other remedies. In at least three ways, the Court's decision in this case inflates this doctrine.

(a) Like the United States in *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), the Petitioners in this case could not have appealed to this Court from the relevant state court judgment; they were not named plaintiffs but mere class members. As in *De Grandy*, therefore, there is no question of the circumvention of this Court's appellate jurisdiction that *Rooker-Feldman* is meant to prevent. Of course, the Petitioners would have become able to appeal had they successfully sought to intervene in the Alabama class action and raise objections there--but the same was true of the United States in *De Grandy*, where the *Rooker-Feldman* doctrine was held not to apply. Other authority supports this principle.[7]

(b) The lower courts stretched *Rooker-Feldman* to govern even when the state judgment in question was reached without

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[6]Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); *see* Asarco v. Kadish, 490 U.S. 605 (1989).

[7]*See* Martin v. Wilks, 490 U.S. 755 (1989)(nonparty not bound even though it had chance to intervene); Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431 (1934)(allowing federal suit by nonparty to state judgment); Valenti v. Mitchell, 962 F.2d 288, 297-98 (3d Cir. 1992)(*Rooker-Feldman* does not bar nonparty).

personal jurisdiction over Petitioners and was also not binding on Petitioners because they were not adequately represented. But the premise of *Rooker-Feldman* is that the judgment of a court that "had jurisdiction of both the subject matter and the parties" may be challenged only by appeal. *Rooker*, 263 U.S. at 415. It has not until now been thought to limit the right of a party not bound by a state court judgment to invoke the jurisdiction conferred on the federal courts by Congress. As already noted, the Seventh Circuit panel's expansion of *Rooker-Feldman* threatens to dislocate the Constitutional law of both personal jurisdiction and class actions.

(c) The lower courts brought into the *Rooker-Feldman* doctrine claims that were not within the scope of the Alabama class action, and could therefore never have been challenged on appeal. For example, malpractice and fraud and RICO claims against the lawyers purporting to represent the class were never part of the Alabama class action, and could not have been added to it without wholesale amendments. Claims of malpractice in settling an underlying action are not barred by the settlement or by its approval by the court, and may be raised in a new action.[8]

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[8]Durkin v. Shea & Gould, 92 F. 3d 1510 (9th Cir. 1996)(class action), cert. petition pending; Diaz v. Sheppard, 85 F. 3d 1502 (11th Cir. 1996)(class action); Derrickson v. City of Danville, 845 F.2d 715 (7th Cir. 1988); Toporek v. Zepp, 1996 Ga. App. Lexis 1256 (Ga. App. 1996); McWhirt v. Heavey, 550 N.W.2d 327 (Neb. 1996); Grayson v. Wolsey, Rosen, Kweskin & Kuriansky,

Similarly, this Court has upheld independent federal actions seeking damages for unconstitutional service of process in state court actions without suggesting *Rooker-Feldman* problems.[9] And in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), six Justices agreed that *Rooker-Feldman* does not bar a state court defendant from clearing the way for an appeal by suing in federal court to challenge state appeal bond rules. 481 U.S. at 18, 21, 28, 31 n. 3. To bring the claims asserted in this case within *Rooker-Feldman* warps that doctrine from its rationale, the protection of this Court's appellate jurisdiction.

4. The lower courts in effect turned the *Rooker-Feldman* doctrine into a new federal common law of res judicata, inconsistently with 28 U.S.C. § 1738's command that state law determines the res judicata effect of a state court judgment in a federal action. This Court has made it clear that

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646 A.2d 195 (Conn. 1994); Cook v. Connolly, 366 N.W.2d 287 (Minn. 1985); *see* Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951)(ordinary preclusion rules relaxed in lawyer-client dispute because of lawyer's fiduciairy duties); Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1141-80 (1996). *But see* Laskey v. International Union, UAW, 638 F.2d 954 (6th Cir. 1981)(class members bound if no due process violation).

[9]Wyatt v. Cole, 504 U.S. 158 (1992); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

federal courts may not add to the res judicata effects of a state judgment prescribed by state law, except on the basis of a specific federal statutory policy.[10] Yet that is what happened in this case.

Unlike res judicata, *Rooker-Feldman* serves the limited purpose of preventing a party from starting a new action when it should have appealed through the state court sustem to this Court. To extend it to prevent an action by one over whom the state court had no jurisdiction, who could not have appealed without first being allowed to intervene, and who asserts claims never before the state court is a recipe fcr confusion and complexity. As the Seventh Circuit has expanded the *Rooker-Feldman* doctrine, it has struggled with little success to distinguish it from res judicata.[11] Scholars have suggested that the doctrine adds nothing of value to res judicata law.[12] The Fifth Circuit has held that *Rooker-*

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[10]*E.g.*, Johnson v. De Grandy, 114 S. Ct. 2647, 2654 (1994); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 384-86 (1985); Haring v. Prosise, 462 U.S. 317, 323 (1983).

[11]See, in addition to the opinion in this case, GASH Assoc. v. Village of Rosemont, 995 F.2d 726 (7th Cir. 1993); Nesses v. Shepard, 68 F. 3d 1003 (7th Cir. 1995); Garry v. Geils, 82 F. 3d 1362 (7th Cir. 1996).

[12]18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4469, at 663-68 (1981); Hart & Wechsler's The Federal Courts and the Federal System 1503-04 (4th ed. 1996); Jack M. Beermann, Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity, 68 B.U.L.

Feldman does not bar a federal action when the rendering state would allow a similar action. Davis v. Bayless, 70 F. 3d 367, 375-76 (5th Cir. 1995); *see* Robinson v. Ariyoshi, 753 F.2d 1468, 1471-73 (9th Cir. 1985), vacated on other grounds, 477 U.S. 902 (1986).

To the extent that the version of *Rooker-Feldman* applied below differs from res judicata, the differences are defects rather than advantages. (a) The lower courts' application of *Rooker-Feldman* gives state court judgments a far wider preclusive effect than res judicata law has traditionally recognized as desirable: it applies even when the state court lacked personal jurisdiction, when its judgment is not binding on class members who received inadequate representation, and when the federal court claim is one of malpractice in the state court proceeding. (b) Because the Seventh Circuit treats *Rooker-Feldman* as a matter of subject matter jurisdiction, a party may raise it without complying with Fed. R. Civ. P. 8(c)'s pleading requirements for res judicata, and appellate courts must search for and decide *Rooker-Feldman* issues

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Rev. 277, 341-42 (1988); Douglas Laycock, The Remedies Issues, 9 Rev. Litig. 473, 524-27 (1990); Note, The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal District Courts, 42 Rutgers L. Rev. 859 (1990).

that no party has raised or argued.[13] (c) As already noted, Congress has directed in 28 U.S.C. § 1738 that state res judicata law, not a new system of federal common law, should govern the effect of state court judgments.

5. The egregious facts of this case accentuate the breadth and novelty of the lower courts' decision. Far from being a case in which refusal by a federal court to hear a claim might seem attractive, the federal court here was asked to remedy truly appalling misconduct. The defendants settled a class action in such a way that class members suffered a net loss; the notice failed to disclose that fact to the class; the class affected included hundreds of thousands of members; the forum state had no connection with the great bulk of the class members, and was also not the home state of the defendants; and the lawyers purporting to represent the class recovered from its members a fee of many millions of dollars for having injured it.[14] There was no need to

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[13]*E.g.*, Young v. Murphy, 90 F. 3d 1225 (7th Cir. 1996); Ritter v. Ross, 992 F.2d 750 (7th Cir. 1993), cert. denied, 114 S. Ct. 694 (1994).

[14]These are the facts alleged by the complaint, which at this stage must be taken as true; the defendant lawyers have admitted receiving $8.5 million in fees and costs. For discussion of the underlying facts, see Susan P. Koniak & George M. Cohen, note 8 *supra*, 82 Va. L. Rev. at 1057-81.

stretch traditional doctrines to protect those who did this.

CONCLUSION

Are all these far-reaching consequences really required by the law? That question calls for this Court's consideration. Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEXTER J. KAMILEWICZ, *et al.*,
Petitioners,

v.

BANK OF BOSTON CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

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QUESTION PRESENTED

Whether certiorari is warranted to review the decision of the court of appeals below that members of an opt-out state court class action that resulted in settlement may not collaterally attack the settlement in federal court by filing an alternative class action raising RICO, section 1983, and other claims, in the novel and unusual circumstances where:

- the federal class action plaintiffs deliberately bypassed their right to opt out of or object to the state class action settlement;
- the state court made three separate determinations that the jurisdictional requirements of *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), were met;
- prior to approving the settlement the state court heard and rejected the same allegations now before the federal court and considered and rejected those allegations a second time by treating the federal class action as a suit to invalidate the settlement under state law;
- in accordance with state law the state court retained jurisdiction over the class action; and
- litigation of the federal class action would require the federal court to review the state court class action proceedings and settlement in plain derogation of this Court's precedents, principles of res judicata, and the respect federal courts typically are required to accord the judgments of the co-equal state courts.

RULE 29.6 STATEMENT

Respondent Bank of Boston Corporation notes that it has three nonwholly owned subsidiaries: (1) Boston Equiserve, Inc., which is 50% owned by Bank of Boston and 50% owned by State Street Bank; (2) Thor Credit Corporation, which is 50% owned by Bank of Boston and 50% owned by Thor Industries (a publicly-traded company); and (3) HomeSide, Inc.

HomeSide—the successor to respondent BancBoston Mortgage Corporation—is also partly owned by Barnett Bank, N.A., and private investors; a portion of its stock is publicly-traded. HomeSide has no nonwholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1184

DEXTER J. KAMILEWICZ, *et al.*,
Petitioners,

v.

BANK OF BOSTON CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

Respondents Bank of Boston Corporation, BancBoston Mortgage Corporation, T. Thomas Cottingham, and Burr & Forman L.L.P. respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

As petitioners' own *amici* observed below, and as is apparent from even a cursory review of the convoluted procedural history below, this is a case characterized by "unusual" facts (App. A7), presenting novel questions of law that—perhaps not surprisingly in view of the peculiar circumstances in which they have arisen—are far better suited for a law school examination than for plenary review by this Court.

None of the factors traditionally warranting plenary review is present. Neither petitioners nor Judge Easterbrook (who all but conceded as much) has identified a genuine conflict of authority. Indeed, as far as we are aware, the court of appeals below is the first to have been presented with the particular form of collateral attack on a state court class action judgment waged by petitioners here. The court's decision that petitioners are *not* free deliberately to bypass state court and to attack the class action judgment in federal court comports with this Court's precedents—including *Hansberry* v. *Lee*, 311 U.S. 32 (1940)—as well as the respect traditionally accorded judgments of co-equal state courts. The result below also comports with numerous other circuit decisions—not cited by petitioners—applying the *Rooker-Feldman* doctrine in more conventional settings.

In view of the unusual circumstances precipitating this action, we doubt that the questions presented will recur soon or often. But if they do, this Court almost certainly would benefit from further deliberation by the lower courts and the joining of issues that comes only with the development of a true conflict. Important jurisprudential concerns also weigh in favor of denying the writ. If adopted, petitioners' position would grant a "free pass" to hundreds of thousands of individuals who are members of state court class actions to sit out the state round of their class action (while not actually availing themselves of the right to opt out) and—if they are unhappy with any aspect of the eventual judgment—to attack the state court judgment in federal court in the guise of "dressed up" (App. A5, A31) RICO and section 1983 claims. This free pass, moreover, would come at the expense of the black letter rule that litigants may not collaterally attack state court civil judgments in the lower federal courts, profoundly affecting both the orderly administration of claims and comity.

The conclusion that the writ should be denied is all the more easy to reach in light of the facts that petitioners

deliberately sat on their opt-out and objection rights in state court; the state court, in any event, carefully considered and rejected—on two separate occasions—the same allegations that petitioners seek to present to the federal courts; the state court determined—on three separate occasions—that the due process requirements of *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), were satisfied; and the state court retained jurisdiction to modify or set aside the class action judgment through the time petitioners filed in federal court. Petitioners seek to gloss over all this; Judge Easterbrook, who did not have the benefit of sitting on the panel, misunderstood important aspects of the state court proceedings and judgment.

There is, in short, no conventional reason for this Court to grant plenary review, and the petition should be denied.

COUNTERSTATEMENT

The Hoffman litigation. In 1991, a class action styled *Hoffman* v. *BancBoston Mortgage Corp.* was filed in Alabama state court by two Alabama residents on behalf of all persons whose mortgages were serviced by respondents Bank of Boston Corporation and BancBoston Mortgage Corporation. The *Hoffman* plaintiffs' central allegation was that Bank of Boston and BancBoston (collectively, "the Bank") "require[d] the class members to deposit [in their mortgage escrow accounts] substantially more than the sums for which their mortgages provide, thereby exacting the use of large amounts of money to which they are not entitled." Amended Complaint ¶ 1, *Hoffman* v. *BancBoston Mortgage Corp.*, No. CV-91-1880-Z (Mobile Cty. Cir. Ct.).[1] "After much arm's length and

[1] Judge Easterbrook's statement that the *Hoffman* plaintiffs' contention was that the Bank "did not promptly post interest to real estate escrow accounts" (App. A36) reflects a serious misunderstanding of *Hoffman*, perhaps due to the fact that he was not on the panel that heard and decided this case. *Cf.* App. A2 (panel opinion describing *Hoffman* suit as "challeng[ing] the manner in

good faith bargaining," Order of Settlement Approval and Final Judgment ("Approval Order") at 2, the parties reached a tentative settlement in November 1993 and the court granted preliminary approval of a Consent Decree embodying the terms of the settlement. *Id.* at 3. In so doing, the court confirmed the class as one in which class members had the right to opt out. Consent Decree ¶ 3 (finding Ala. R. Civ. P. 23(b)(3) applicable).[2]

In December 1993, a notice of the proposed settlement —specifically approved by the court—was mailed to class members and published for two days in *USA Today*. Approval Order at 3. The notices both announced that a hearing would be held to determine whether the settlement was "fair, reasonable and adequate" and explained the terms of the settlement. Notice of Hearing on Proposed Settlement of Class Action ("Settlement Notice") at 1, 2-6; *see* Consent Decree at 4. Under the heading "**RIGHT TO EXCLUDE YOURSELF FROM THE SETTLEMENT CLASS**," the notices explained that each class member had the right to opt out of the case and provided a form for that purpose. Settlement Notice at 8 (emphasis as in original); *see* Approval Order at 3. Although some 415,000 notices were mailed, only about 1,500 class members elected to opt out. Approval Order at 4.[3] The notices explained that class counsel's fee re-

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which BancBoston calculated the amount of surplus each member of the class was required to maintain in their escrow accounts"). Judge Easterbrook's misunderstanding also led him dramatically to understate the value of the settlement to the *Hoffman* class. *See infra* note 4.

[2] Accordingly, petitioners' repeated suggestion that the *Hoffman* class members were denied "an opportunity to opt out," Pet. 1, 2, is simply wrong.

[3] A sample of those who opted out was contacted to determine their reasons for doing so. "Most of the persons contacted who requested exclusion did not wish to participate in any type of class action litigation or did not feel that BancBoston had handled their individual account improperly." Approval Order at 4.

quest would be considered at the fairness hearing; that the fee award would be based on the economic benefit to the class of the settlement (and would not exceed one-third of that benefit); and that the fees would be paid out of each class member's escrow account. Settlement Notice at 5; *see* App. A5; *cf.* App. A82.

The court held a fairness hearing on January 10 and 11, 1994, during which the court received evidence and heard argument regarding both the settlement and attorneys' fees. App. A109. A representative of the Florida Attorney General—who had been allowed to intervene for the purpose of objecting to the settlement on behalf of absent class members—participated extensively in the hearing, *see* Tr. of Jan. 10-11 Hrg. at 14-15, 22-34, 43-46, 71-91, 93-120, and also submitted a post-hearing brief opposing the settlement and fee request. App. A114. Following the hearing, and after considering the report of a special master appointed to review the settlement, the court approved the settlement and awarded attorneys' fees to class counsel. *Id.* at A109-A110.

A major component of the relief won by the class in the settlement was prospective. The settlement called for the Bank to change its methodology for calculating escrow account deposit requirements so that mortgagors would be able to maintain lower account balances—an average of 19% lower. Approval Order at 6, 8. The court found in the Approval Order that this prospective relief was the "principal benefit" of the settlement and "the most that could be maximized from this case even if the case had progressed to a very favorable jury verdict." *Id.* at 6, 9. The settlement also called for the Bank to refund to each mortgagor or credit his account with any surplus escrow funds resulting from the change in the Bank's accounting methodology. *Id.* at 6. At the time of settlement, it was expected that the change in the Bank's accounting methodology would result in approximately $42 million in refunds, *see* Tr. of Jan. 10-11 Hrg. at 95-98; some $30 million was actually refunded. Finally, the

Bank was to pay a small amount of interest to certain class members. Approval Order at 6-7.[4]

The court awarded attorneys' fees equal to 28% of the amounts refunded to the class due to the change in accounting methodology, which fees were to be deducted from the mortgagors' escrow accounts. *Id.* at 13-14.[5] The court considered the Florida Attorney General's suggestion that the Bank should be made to pay class counsel's fees but rejected it, in part out of ethical considerations. *Id.* at 10.[6]

The court approved the settlement on January 24, 1994, and entered a Consent Decree which made the settlement its final judgment in the case. No appeal from the court's final judgment was taken by any party.

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[4] Judge Easterbrook's assertion that under the settlement "the maximum award to any class member was less than $9" (App. A36) reflects only the Bank's *interest* payments and completely ignores the substantial economic benefit to the class of the prospective relief—which the Alabama court found to be the "principal benefit" of the settlement (Approval Order at 6)—and the refunds obtained from the Bank. That the interest payments would be modest in comparison to the other forms of relief secured by the settlement was known at the time of settlement. *See id.* at 6-7.

[5] Petitioners object to the fact that the settlement based attorneys' fees on the amount of refunds received by the class, suggesting that on the particular facts the court erred in viewing the total amount of the refunds as an economic benefit. That fact-specific question plainly does not warrant review, and, in any event, the court reduced the one-third amount requested by class counsel to 28% and applied the 28% figure only to the refunds—not to any amount representing the economic benefit of the prospective relief or to the interest payments received by the class.

[6] When an attorney tries to negotiate a settlement that would include payment of fees by the opposing party, a conflict of interest between the attorney and his client will arise in two situations: first, where the opposing party offers to settle on the cheap but pay high fees and, second, where the opposing party offers a valuable settlement but very low fees. *See* Approval Order at 10; Tr. of Jan. 10-11 Hrg. at 61-62.

The Kamilewicz Suit. Petitioners were members of the *Hoffman* class. It is undisputed that they received the court-approved notice of the settlement and their right to opt out. They elected not to opt out of that class (as 1,500 others did) or to file any objection to the settlement (as 200 others did). Approval Order at 4. Rather, they elected to pursue an altogether different course.

On November 2, 1995, petitioners filed a class action of their own against the Bank and the lawyers on both sides of the *Hoffman* case in federal district court in Illinois, seeking to overturn the settlement approved by the Alabama court. Petitioners essentially alleged that the Bank and its counsel conspired with counsel for the plaintiff class to deceive class members and the Alabama court regarding the economic benefit of the settlement so that class counsel could recover excessive fees. In their complaint, petitioners asserted numerous far-reaching causes of action, including federal racketeering and civil rights violations, as well as common law claims of fraud, conversion, malpractice, and breach of fiduciary duty. Respondents moved to dismiss the case on the ground that petitioners were barred from collaterally attacking the state court judgment in federal court by this Court's *Rooker-Feldman* doctrine,[7] as well as by res judicata and collateral estoppel principles. App. at A26-A27.

While that motion was pending, on November 22, 1995, class counsel in *Hoffman* moved the Alabama court for an order directing petitioners to show cause why they were not bound by the settlement.[8] On December 4,

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[7] *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), lend their names to this doctrine.

[8] In the Consent Decree, the Alabama court had expressly "retain[ed] jurisdiction of this action for the purpose of issuing any and all orders or decrees as may be necessary to effectuate, clarify, modify, or enforce the purpose, intent and terms of this Consent Decree." Consent Decree ¶ 20. *See* App. A12, A107.

1995, the Alabama court granted the motion and ordered petitioners to appear for a hearing later that month. The order indicated that at the hearing petitioners would be "given the opportunity to present evidence and testimony in support of their allegations." *Id.* at A112. On the day of the hearing, December 18, 1995, petitioners dispatched an attorney to inform the Alabama court that they would not be present. The hearing resulted in the issuance of an order on January 30, 1996. *Id.* at A106-A117.

In the January 30 order, the Alabama court explained that it had treated petitioners' action in federal court as an "independent action" under Alabama Rule of Civil Procedure 60(b) to set aside the settlement. *Id.* at A111. The Alabama court first rejected petitioners' contention that it lacked personal jurisdiction over them, noting that this was the third time it had found jurisdiction over out-of-state class members. *Id.* at A113 & n.1. The court reasoned that, under *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), petitioners—as members of the *Hoffman* class—were subject to the jurisdiction of the court because the class members (1) received the best possible notice of the action; (2) were provided an opportunity to be heard; (3) had the option to opt out of the class; and (4) were adequately represented. App. A113.

The court then explained that it had

> reexamine[d] the evidence presented at the Fairness Hearing as well as the pleading[s] filed in the *Hoffman* case and the proceedings prior to the Fairness Hearing. Having freshly reviewed that evidence, those pleadings, and the prior proceedings, this Court finds no evidence of fraud on this Court as alleged by [petitioners]. Additionally, this Court finds that the substance of [petitioners'] arguments concerning "economic benefit" and the possible "net loss" to some class members was raised, argued and briefed by the Florida Attorney General's office. Therefore, these

> arguments have already been fully adjudicated and decided by this Court. [*Id.* at A114.[9]]

The court also reaffirmed that class counsel had adequately represented the class throughout the litigation. *Id.* The court therefore reapproved the settlement in its entirety. *Id.*

On December 15, 1995, the federal district court, relying on respondents' *Rooker-Feldman* defense, held that petitioners were barred from collaterally attacking the state court class action judgment in the manner attempted. The court observed that "[e]ven though their request for relief is dressed up as damages under RICO, section 1983, or for attorney malpractice, the plaintiffs are asking us to undo what the Alabama court did, and that constitutes a[n] impermissible collateral attack upon the state court judgment." *Id.* at A31. The court explained that dismissal "does not leave [petitioners] without a remedy," given the availability of relief in the Alabama state court. *Id.* at A33. The district court noted that it had "considerable trouble understanding why [petitioners] should not receive fair treatment in that court." *Id.* at A32 n.3.

A unanimous panel of the Seventh Circuit affirmed. The court explained that because petitioners' "federal claims are 'inextricably intertwined' with the state court judgment, whether that judgment is right or wrong," the case had to be dismissed under *Rooker-Feldman*. *Id.* at A13.[10] The court thereby rejected petitioners' "far-reaching proposed exception" to *Rooker-Feldman*, which

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[9] The court pointed out that "the class unquestionably received a benefit" in that the settlement required the Bank to change its escrow balance accounting methodology to one that required lower balances on average. App. A115 n.3.

[10] Respondents argued in the Seventh Circuit that dismissal was required not only by *Rooker-Feldman* but also by the doctrine of res judicata and because of the Consent Decree entered in *Hoffman*. *See* Respondents' C.A. Br. 16-45. The result below may be defended on any of these grounds.

would allow collateral attack in federal court upon a state court judgment allegedly entered in violation of due process. *Id.* at A10. The court also observed that

> the proper court for an assertion of fraud in the procurement of a judgment is the one which rendered the judgment. * * * Alabama has a procedure by which a litigant can assert an independent action for fraud upon the court within three years of the entry of the fraudulently induced judgment. In addition, the Alabama court retained continuing jurisdiction over the class action. It is not for the federal court to decide these issues. [*Id.* at A11, A12 (citing Ala. R. Civ. P. 60(b)).]

The Seventh Circuit denied rehearing and rehearing en banc. Judge Easterbrook and four other judges dissented from the denial of rehearing en banc.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS THE ONLY CASE OF ITS KIND AND CONFLICTS WITH NONE OF THIS COURT'S DECISIONS OR ANY OTHER COURT OF APPEALS DECISION.

1. The principal issue in this case arises from a rare intersection between the *Rooker-Feldman* doctrine—*i.e.*, the well-established rule that lower federal courts may not review state court judgments—and other legal principles unique to the class action context. The Seventh Circuit's application of *Rooker-Feldman* in the unusual factual setting of this case conflicts with no case decided by this Court or any other court of appeals. Indeed, one will read the petition in vain for a citation to any other case where the same issue was raised—let alone decided differently—on similar facts.[11] For these reasons alone, cer-

[11] Petitioners themselves acknowledged below that "no court before now ever has applied the *Rooker-Feldman* doctrine to a state court judgment that seeks to bind class members in the absence of personal jurisdiction." Pet. Reh'g Reply at 3. To complete the

tiorari should be denied. This Court does not sit to review cases which, like Haley's Comet, create a commotion but appear with the utmost infrequency and collide with nothing.

Petitioners' own *amici* in the court below aptly described the case as involving "unusual circumstances." App. A7; C.A. Brief *Amici Curiae* of the Attorneys General of New Hampshire, *et al.*, at 2. Petitioners were members of an opt-out class action in Alabama state court. Despite receiving notice of the proposed settlement, they neither exercised their right to opt out nor objected to the settlement. Instead, after the settlement was confirmed, they installed themselves as the named plaintiffs in a class action alleging that the Alabama defendants and their lawyers conspired with class counsel to perpetrate a fraud on the Alabama court and the members of the plaintiff class—an allegation that the Alabama court has actually considered and rejected. Although the Alabama court satisfied itself as to its jurisdiction under *Shutts* (three different times), petitioners allege that that court never had jurisdiction over them. And although the Alabama court expressly retained jurisdiction over the settlement, petitioners deliberately bypassed that available forum and instead filed their own class action in federal court in Illinois. Petitioners now assert an entitlement to a federal forum in which to impugn the judgment of the Alabama court.

2. Not surprisingly given the unusual circumstances in which this case has arisen, petitioners are unable to identify a single conflict of authority warranting this Court's review. Petitioners allege a conflict with only one other circuit on the first question they present for review, *see* Pet. 25, and even there the alleged conflict fails to pan out. Petitioners cite only two cases, *Gauthier* v. *Continental Diving Serv., Inc.*, 831 F.2d 559 (5th Cir.

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thought, no court has *declined* to apply the *Rooker-Feldman* doctrine in such circumstances.

1987), and *Davis* v. *Bayless*, 70 F.3d 367 (5th Cir. 1995). Neither case even involved a class action, so neither opinion addressed the legal question petitioners seek to raise against the factual backdrop directly pertinent to a proper resolution of that question: whether plaintiff class members who declined to opt out of state court class proceedings may attack collaterally the state court judgment in federal court, when the state court had retained jurisdiction, afforded the class members an available means to seek relief from the judgment, and specifically addressed and adjudicated the claims the class members sought to raise collaterally in federal court.

Gauthier simply held that *Rooker-Feldman* did not "require a federal court to give greater deference to a state court judgment than a court of the state in which the judgment was rendered would give it." 831 F.2d at 561. Certainly another Alabama court would defer to the state court's express retention of jurisdiction in this case, *see, e.g.*, *Ex parte Liberty Nat'l Life Ins. Co.*, 631 So.2d 865, 867 (Ala. 1993) (requiring dismissal of action in which plaintiffs "were attempting to have a second circuit court review the case and reverse the orders of the first circuit court to exercise jurisdiction"), so the *Gauthier* holding is of no help to petitioners. *Davis* simply repeated the *Gauthier* holding, so it too is inapplicable on the facts of the present case. *See* 70 F.3d at 375-376.[12]

In any event, other recent Fifth Circuit decisions—not cited by petitioners—reflect an understanding and application of the *Rooker-Feldman* doctrine that is fully in keeping with the decision below. In *Liedtke* v. *State Bar of Texas*, 18 F.3d 315 (5th Cir.), *cert. denied*, 115 S. Ct. 271 (1994), for example, Liedtke was disbarred without,

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[12] Although Judge Easterbrook is no stranger to the factors prompting a grant of certiorari, the only circuit court case he was able to point to as being remotely in conflict with the panel's decision is *Davis* v. *Bayless*, App. A39, and, as discussed, that case did not even involve a class action.

he contended, notice of or opportunity to be heard in the disbarment proceeding. Much like petitioners, Liedtke argued that "his disbarment violated due process" in that he was not given a "full and fair opportunity to be heard" and hence "the judgment of the state district court should be deemed void and unenforceable." *Id.* at 317. But the Fifth Circuit affirmed the dismissal of his section 1983 suit on *Rooker-Feldman* grounds, saying that his "recourse was with the state appellate courts and thereafter the United States Supreme Court on application for a writ of certiorari, not by a complaint to the federal district court." *Id.* at 318. *See also Musslewhite* v. *State Bar of Texas*, 32 F.3d 942 (5th Cir. 1994) (affirming dismissal of collateral attack upon suspension from practice), *cert. denied*, 115 S. Ct. 2248 (1995). It is plain that petitioners would have found no relief in the *Liedtke* court. At most, then, the law in the Fifth Circuit is unsettled. The conflict, if any, between the Fifth Circuit's decisions is a matter for that court to resolve in the first instance. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

3. On the merits, petitioners attempt to ground their claim of a right to a federal forum for their collateral attack in several of this Court's cases. On examination, however, those cases fall far short of supporting their claim.

a. In *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and *Richards* v. *Jefferson County*, 116 S. Ct. 1761 (1996), this Court held that it violates due process "to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented." *Id.* at 1764. But neither case establishes that litigants who claim not to be bound by a prior state court judgment may collaterally attack that judgment in federal court. In *Hansberry*, property owners brought suit in Illinois *state* court to enforce a restrictive covenant. This Court held that the defendants in that case could challenge the enforceability of the

covenant even though the issue had been litigated in an earlier case *in Illinois state court* because "the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action." *Id.* at 1767.

In *Richards*, this Court faced "the same basic question" (*id.* at 1764) as in *Hansberry* and held that a plaintiff class *in Alabama state court* was not bound by the judgment in another Alabama state court case since plaintiffs "neither participated in, nor had the opportunity to participate in" the prior case, a case as to which they were "best described as mere strangers." *Id.* at 1768 (citations and quotation marks omitted). Thus, neither *Hansberry* nor *Richards* can support a right to attack a state court judgment in *federal* court. That distinctive aspect of petitioners' claim implicates the *Rooker-Feldman* doctrine, which was not even at issue on the facts of *Hansberry* or *Richards*.[13]

b. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), is of even less help to petitioners since there was but a single suit in that case. *Shutts* holds that the judgment of a state court in a class action seeking monetary relief binds an absent plaintiff so long as he receives notice plus opportunity to be heard and participate in the litigation, as well as the chance to opt out of the class, and the class representative adequately represents the

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[13] *Richards* is further distinguishable in that the first action in that case was not even a class action. Petitioners here can hardly be "described as mere strangers" to the Alabama state court proceeding, 116 S. Ct. at 1768; they were instead members of the plaintiff class in that proceeding. In addition, unlike the plaintiffs in *Richards*, petitioners here not only "had the opportunity to participate in" the Alabama court action, *id.*, they were expressly notified of that right as well as the right to opt out, and chose to exercise neither. Finally, this Court in *Richards* expressly recognized class actions as exceptions to the rule it reiterated in that case. *See id.* at 1766.

class's interests. *Id.* at 812. Here, the Alabama court ruled that these conditions were met. App. A112-A113. Nothing in *Shutts* gives petitioners the right to challenge a state court class action in federal district court.

Petitioners argue that they are not bound by the Alabama judgment under *Shutts* because the rule of that case applies only to class action plaintiffs; they assert that the settlement cost them money and therefore they were essentially defendants in the Alabama action. Pet. 15. Petitioners simply misread *Shutts*. The holding in *Shutts* that absent plaintiffs are bound by the judgment in a class action if the factors recited above are met was not predicated on the assumption that a plaintiff class faces no possibility of economic loss. Indeed, the *Shutts* court was fully aware that class members may sometimes (if rarely) be liable for fees and costs and even subject to counterclaims, *see* 472 U.S. at 810, and that an adverse judgment will result in the loss of a chose in action—"a constitutionally recognized property interest." *Id.* at 807. Under petitioners' approach, moreover, the jurisdiction of a class action court could not be determined *ex ante*; the court's jurisdiction would depend upon the results in the case.

c. *Matsushita Elec. Indus. Co.* v. *Epstein*, 116 S. Ct. 873 (1995), involved two class actions, one in state court and one in federal court, arising out of Matsushita's acquisition of another company by way of a tender offer. The first class action was filed in Delaware state court and asserted state law claims. While that case was pending, another class action was brought in federal district court in California alleging that the tender offer violated federal law. The district court denied class certification, entered summary judgment for Matsushita, and dismissed the case, whereupon the plaintiffs appealed to the Ninth Circuit. Before the Ninth Circuit could rule, the parties in the Delaware case negotiated a settlement under which all class members who did not opt out would waive all claims, including those asserted in the federal action in

California. In the Ninth Circuit, Matsushita then "invoked the Delaware judgment as a bar to further prosecution of that action under the Full Faith and Credit Act, 28 U.S.C. § 1738." *Id.* at 877. The Ninth Circuit rejected the argument but this Court reversed, holding that the Delaware judgment was entitled to full faith and credit.

Petitioners make much of the fact that in *Matsushita* this Court "never once mentioned *Rooker-Feldman*," Pet. 24, even though—they allege—the doctrine would seem to apply on the facts of that case. But petitioners read far too much into the Court's silence, for "not every silence is pregnant." *Burns* v. *United States*, 501 U.S. 129, 136 (1991) (quotation marks and brackets omitted). It is hardly surprising that this Court in *Matsushita* did not mention *Rooker-Feldman* since (1) this Court held that the Delaware judgment was entitled to full faith and credit, (2) the federal district court could not have applied *Rooker-Feldman* because it dismissed the case before the Delaware court had rendered judgment, (3) the Ninth Circuit had not addressed *Rooker-Feldman*, and (4) *Rooker-Feldman* was not within the question presented. *Cf. Deakins* v. *Monaghan*, 484 U.S. 193, 202 n.6 (1988) (refusing to consider abstention issue where it was not addressed below or within the question presented). And it was not, as Judge Easterbrook contended, "obvious * * * to all concerned" (App. A41) that *Rooker-Feldman* was inapplicable in *Matsushita*. In fact, the petitioner in *Matsushita* raised the doctrine in its brief, albeit without extended discussion. *See* Brief for the Petitioner at 35 n.29 (No. 94-1809).

4. Far from creating conflict, the Seventh Circuit's application of *Rooker-Feldman* here is in line with this Court's elaboration of the doctrine and other circuit court decisions outside of the class action context. (We are not aware of *any* other *Rooker-Feldman* cases within the class action context. *See* note 11, *supra.*) Under *Rooker-*

Feldman, the lower federal courts may not exercise "what in substance would be appellate review of" the judgment of a state court in a civil case. *Johnson* v. *DeGrandy*, 512 U.S. 997, 1005 (1994). *See Feldman*, 460 U.S. at 486 (no review of "allegations [that] are inextricably intertwined with" a state court judgment); *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 18 (1987) (Scalia, J., concurring) (same). The doctrine is based on the understandings that this Court's jurisdiction over state court judgments under 28 U.S.C. § 1257 is exclusive, *see ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 622 (1989); *Pennzoil*, 481 U.S. at 24-25 (Marshall, J., concurring in the judgment), and that the jurisdiction of federal district courts "is strictly original." *Rooker*, 263 U.S. at 416. *See* 28 U.S.C. § 1331; *cf.* 28 U.S.C. § 2254. The doctrine unquestionably applies to constitutional claims. *Feldman* itself involved a Fifth Amendment challenge brought under section 1983 to the District of Columbia Court of Appeals' refusal to waive a bar admission requirement.

Here, there can be no question but that petitioners' claims against the Bank and its counsel in *Hoffman* are inextricably intertwined with the Alabama court's judgment and amount in substance to a request for appellate review of that court's judgment—a fact recognized not only by the Seventh Circuit [14] and the district court but also by Judge Easterbrook, who acknowledged that petitioners seek "to obtain collateral review of the state court's judgment." App. A38. Petitioners do not seri-

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[14] The Seventh Circuit noted that petitioners' arguments were somewhat like "shifting sand" (App. A6) as they sought simultaneously to attack the Alabama state court judgment and avoid the application of *Rooker-Feldman*. Their argument in that court is fairly characterized as a collateral attack upon the Alabama court's judgment. *See* Petitioners' C.A. Br. at 5 (the Alabama judgment "is null and void for lack of personal jurisdiction"); *id.* at 14 ("the state court class action violated the due process rights of those plaintiffs and therefore resulted in a judgment that is null and void").

ously contend otherwise. Indeed, the thrust of their submission is not that *Rooker-Feldman* is inapplicable on the facts of this case but that the Seventh Circuit improperly "elevat[ed]" that doctrine over other considerations. Pet. 22. In other words, their complaint is that the court below refused to accept their "far-reaching proposed exception to the *Rooker-Feldman* doctrine." App. A10.

No court has accepted the argument that *Rooker-Feldman* fails to apply when the state court judgment at issue is attacked on grounds that it was entered by a court lacking jurisdiction and in violation of due process. On the contrary, the courts of appeals are in agreement that *Rooker-Feldman* applies even in that situation. For example, in *Postma* v. *First Fed. Sav. & Loan*, 74 F.3d 160 (8th Cir. 1996), First Federal filed a mortgage foreclosure action against Greta and Harold Postma in state court and obtained a judgment of foreclosure. The Postmas then filed in federal district court what was "essentially a collateral attack" (*id.* at 162) on the state court judgment, raising numerous federal and state law claims against First Federal and a mediation service. The district court dismissed the action on *Rooker-Feldman* grounds and the Eighth Circuit affirmed. On appeal, the Postmas argued that "the *Rooker-Feldman* doctrine does not apply when the plaintiff has been denied procedural due process in the state court." *Id.* Asserting that "they did not receive constitutionally adequate notice" and "were denied a fair opportunity to participate," *id.*, the Postmas claimed that they had not received important filings; that Greta had never been served and never appeared in the state court; and that Harold had not consented to the state court's jurisdiction. *See id.* at 162 n.3. But the Eighth Circuit rejected the argument, observing that "contrary to the Postmas' argument, there is no procedural due process exception to the *Rooker-Feldman* doctrine." *Id.* Federal district courts cannot hear challenges to state court decisions, the Eighth Circuit explained, "even if

those challenges allege that the state court's action was unconstitutional." *Id. See also In re Goetzman*, 91 F.3d 1173, 1178 (8th Cir.) (applying *Rooker-Feldman* to claim that state court violated due process), *cert. denied*, 117 S. Ct. 612 (1996); *Wang* v. *New Hampshire Bd. of Registration in Medicine*, 55 F.3d 698, 703 (1st Cir. 1995) (same); *Liedtke* v. *State Bar*, 18 F.3d at 317-318 (same); *MacKay* v. *Pfeil*, 827 F.2d 540, 543-545 (9th Cir. 1987) (per curiam) (applying *Rooker-Feldman* to claim that state court lacked personal jurisdiction).

II. PETITIONERS COULD—AND SHOULD—HAVE LITIGATED THEIR PRESENT CLAIMS IN STATE COURT OR EXERCISED THEIR RIGHT TO OPT OUT OF THE STATE COURT PROCEEDINGS.

1. This Court rarely grants certiorari in the absence of a direct conflict of authority, and there is no basis for doing so here. This case involves not simply an attempt collaterally to attack a state court judgment in federal court, but a federal court collateral attack on a state court judgment where the state court had expressly retained jurisdiction over the case and was prepared to hear the very claims raised in federal court. Petitioners' claim of right to a federal forum is undercut by their deliberate bypass of an available state court remedy.

This Court has indicated time and again that state courts are fully capable of adjudicating federal constitutional claims. *See, e.g., Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 930 (1975); *Swain* v. *Pressley*, 430 U.S. 372, 383 (1977); *Moore* v. *Sims*, 442 U.S. 415, 430 (1979) (this Court has "repeatedly and emphatically rejected" claims to the contrary); *Withrow* v. *Williams*, 507 U.S. 680, 723 (1993) (Scalia, J., concurring in part and dissenting in part) ("It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower

federal courts (as our Constitution does not)."). Indeed, the Court has made just such an observation in the *Rooker-Feldman* context. *See Feldman*, 460 U.S. at 484 n.16. Thus, what this Court said 30 years ago in *Walker* v. *City of Birmingham*, 388 U.S. 307, 319 (1967), is just as true today: "It cannot be presumed that the Alabama courts would have ignored the petitioners' constitutional claims." In this case, there is no question but that petitioners could have raised their claims in the Alabama court.[15] In fact, that court *did* consider their claims in the January 30 order. App. A111-A117. Of course, after litigating their claims in state court petitioners could have sought federal court review on a petition for a writ of certiorari.

2. The Seventh Circuit's refusal to permit petitioners to bypass state court and collaterally to attack the *Hoffman* judgment in federal court is also supported by important policy considerations embraced by this Court. As an abstention doctrine, *see DeGrandy*, 512 U.S. at 1005, *Rooker-Feldman* serves to promote principles of judicial federalism. *See Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1720 (1996); *id.* at 1729 (Kennedy, J., concurring) ("Abstention doctrines are a significant contribution to the theory of federalism and to the preserva-

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[15] Petitioners' failure to present their objections to the Alabama courts is even more remarkable in light of the fact that under Alabama law parties may litigate on the merits while at the same time preserving a valid personal jurisdiction defense. Thus, in *Creel* v. *Gator Leasing, Inc.*, 544 So.2d 936 (Ala. 1989), in which an out-of-state company raised a successful personal jurisdiction defense, the Alabama Supreme Court stated: "No defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion. * * * Thus, a defense of lack of personal jurisdiction over the person may be made in a motion or answer raising other defenses that formerly would have constituted a general appearance." *Id.* at 938. *See also Ex parte ACK Radio Supply Co.*, 219 So.2d 880 (Ala. 1969); *Gaudin* v. *Collateral Agency, Inc.*, 624 So.2d 631 (Ala. Civ. App. 1993).

tion of the federal system in practice."); *Growe* v. *Emison*, 507 U.S. 25, 32 (1993) (abstention doctrines based on "principles of federalism and comity"). It would do violence to these principles for a federal court to entertain a collateral attack on a state court judgment when the state court has determined that it had jurisdiction and has expressly retained that jurisdiction. Thus, dismissal of petitioners' case from federal court "is eminently defensible on policy grounds." *Feldman*, 460 U.S. at 484 n.16.[16]

After petitioners filed their federal court class action, the Alabama court directed them to show cause why they were not bound by the *Hoffman* settlement and ordered them to appear at a hearing for that purpose. Although, as the Alabama court noted, "there can be no question that [petitioners] and their counsel had actual notice of the hearing" (App. A111), they refused to appear for it. Notably, this hearing was held three days *after* the federal district court had dismissed petitioners' case and had expressly advised them that their only remedy lay with the Alabama court. *Id.* at A33. Following the hearing, in its January 30 order, the Alabama court held that petitioners "are bound by the Order of Settlement and are precluded

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[16] In the one context in which the lower federal courts *do* have jurisdiction to review state court judgments—in the *criminal* habeas corpus context—this Court has long required (even before Congress did so in 28 U.S.C. § 2254(c)) that available state process and remedies be exhausted in order to advance comity interests. *See Ex parte Royall*, 117 U.S. 241, 251 (1886); *Rose* v. *Lundy*, 455 U.S. 509, 515-516 (1982); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 8 (1992). Petitioners not only made no effort to exhaust the state process and remedies that were available to them, but they took the most problematic course identified by this Court—they sought a deliberate bypass of state court altogether. This is all the more astonishing given that—in addition to having the right to raise objections during the fairness hearing and to file a Rule 60(b) motion to set aside the judgment—petitioners had the right to "opt out" of the state court proceedings altogether. Yet they elected *not* to avail themselves of any of these rights.

from reasserting the claims dismissed in the Federal Class Action in any forum." *Id.* at A118. In these circumstances, the principles of comity and federalism that underlie this Court's abstention doctrines strongly support dismissal of petitioners' case.

3. Finally, even if petitioners were somehow able to surmount the *Rooker-Feldman* doctrine, they would run head-long into res judicata, which was advanced by respondents in both the district court and court of appeals below, *see* App. A26-A27; Respondents' C.A. Br. at 32-41, and provides an independent ground for denying petitioners relief. As this Court recently explained in *Matsushita,* federal courts must accord state court class action judgments the same preclusive effect to which they would be entitled in the judgment-rendering state. 116 S. Ct. at 877-878. Thus, in determining "that a Delaware court would afford preclusive effect to the settlement judgment in [*Matsushita*]," the Court relied specifically on the fact that the Delaware courts had found that the due process requirements of *Shutts* were met. 116 S. Ct. at 880. The same is true here, except the Alabama courts found on three separate occasions that these requirements were met. As in *Matsushita,* then, the state court judgment is entitled to preclusive effect.[17]

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[17] Even Justice Ginsburg, who in her separate opinion in *Matsushita* discussed the importance of the adequacy of representation requirement, *see* 116 S. Ct. at 888-890, did not maintain that a federal court in determining whether to give a state class action judgment preclusive effect could simply determine *de novo* whether the *Shutts* due process requirements—including adequate representation—had been met. To the contrary, Justice Ginsburg recognized that it was "the first line responsibility of the states themselves for assuring that the[se] constitutional essentials are met." *Id.* at 888. And, in determining whether the Delaware judgment met those requirements, Justice Ginsburg focused on whether the *Delaware* courts had in fact made a finding that the representation was adequate, *id.* at 889, as the Alabama court plainly did in the *Hoffman* action.

Petitioners' refrain that the Alabama courts lacked jurisdiction over them does not alter this conclusion. As this Court has held, "[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982). The only requirement is that the matter have been fully and fairly litigated in the prior proceeding. *See Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) ("a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment") (internal quotation marks omitted).[18] Here, it was—*three* times. *See, e.g., Stone* v. *Williams*, 970 F.2d 1043, 1057-58 (2d Cir. 1992) (giving preclusive effect to Alabama jurisdictional ruling), *cert. denied*, 508 U.S. 906 (1993); *Steph* v. *Scott*, 840 F.2d 267, 270 (5th Cir. 1988) (state court's "jurisdictional recitals were binding on the district court and rendered the [state court] judgment absolutely immune from collateral attack").[19]

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[18] This distinguishes the situation where a party seeks to challenge the entry of a default judgment against him by another court on the ground that the court lacked jurisdiction over him. There, the personal jurisdiction question is not litigated in the first action, and thus is not entitled to any preclusive effect in the second. *Cf. Covington Indus., Inc.* v. *Resintex A.G.*, 629 F.2d 730, 732 (2d Cir. 1980).

[19] Alabama law is clear that absent members of an opt-out class action settlement—who receive actual notice of the settlement and their right to be heard but decline to opt-out—may be barred under the res judicata doctrine from collaterally attacking the class action settlement on the ground that the first court lacked jurisdiction over them, so long as the first court had "at least colorable jurisdiction over the absent class plaintiffs." *See Martin* v. *Drummond Co.*, 663 So.2d 937, 948 (Ala. 1995), *cert. denied*, 116 S. Ct.

Nor, as *Matsushita* itself makes clear, does it matter that this case involves a class action. 116 S. Ct. at 880. *See also Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation"). Indeed, as one court has observed, the fact that the prior action is a class action "weighs in favor of, not against, applying *res judicata*: an obvious purpose of permitting class actions is to bind members of the class." *Jamerson* v. *Lennox*, 356 F. Supp. 1164, 1169 (E.D. Pa.), *aff'd*, 414 U.S. 802 (1973). It is especially appropriate to promote that purpose where, as here, the prior action afforded class members the right to opt-out, class members were given individual written notice of that right, and the second action is brought as a collateral attack by class members who declined to exercise that right. *See Martin* v. *Drummond Co.*, 663 So.2d at 947-948.[20]

1040 (1996). Petitioners here have waged the same type of collateral attack attempted in *Martin*, except they have attempted to do so in federal rather than state court, and thus face a *Rooker-Feldman* bar as well; but their claims are in any event barred under Alabama preclusion rules. Indeed, not only did the Alabama court have "colorable jurisdiction" over petitioners in the *Hoffman* action, the court made three separate determinations that it in fact had such jurisdiction under *Shutts*.

[20] Apart from simply opting-out, petitioners had several available avenues of redress for challenging the state court proceedings and judgment. They had the right to appear at the fairness hearing and raise virtually any objection to the proceedings or judgment (including the trial court's *Shutts* determinations), and to appeal from any adverse ruling. They had the right to seek post-judgment relief under the Alabama version of Rule 60(b). *See Matsushita*, 116 S. Ct. at 890 n.11 (recognizing the availability of Rule 60(b) for challenging adequacy of representation) (Ginsburg, J., concurring in part and dissenting in part). And they had the right to seek review of the state court rulings in this Court. 28 U.S.C. § 1257. But rather than availing themselves of any of these open avenues of redress, they chose to tread down the path plainly barred by *Rooker-Feldman* and res judicata.

To the extent petitioners claim they are in a bind, it is one entirely of their own making, and one quite distinct from the dilemma faced by the plaintiffs in *Hansberry* and *Richards*. The plaintiffs in those cases came along after the first action had been litigated and sought to file an independent action against the original defendant (in the same state) only to find out that their claims had been litigated. 311 U.S. at 38; 116 S. Ct. at 1764-65. Petitioners here, by contrast, received actual notice of the prior action, as well as their right to participate in or opt out of that action. But they elected *not* to participate in or opt out of that state action and, instead, to file a separate class action in federal court. That federal action, moreover, is nothing like the independent action waged by the plaintiffs in *Hansberry* and *Richards*; it is a no-holds-barred collateral attack on the state court action petitioners deliberately sat out.[21]

Neither *Hansberry* nor *Richards* speaks to this novel situation, and, as discussed, petitioners have failed to cite any precedent, state or federal, permitting parties in *their* position to proceed with a collateral attack—especially when, as here, that attack is brought in federal court against a state court judgment. The novelty of petitioners' situation is reason enough to deny the writ. That the Seventh Circuit decision barring petitioners' collateral attack is supported by both *Rooker-Feldman* and res judicata principles provides even more reason to deny the writ, and, instead, to wait and see whether this unusual situation recurs and, if it does, whether any conflict of authority in fact develops.

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[21] *Richards* is distinguishable in another fundamental respect. The prior action in that case—unlike the *Hoffman* action here—did not involve a class action in which the Rule 23 and *Shutts* determinations had been made, and thus did not purport to bind non-parties such as the subsequent plaintiffs in *Richards*. *See* 116 S. Ct. at 1767.

III. REVIEW OF PETITIONERS' MALPRACTICE CLAIM AGAINST CLASS COUNSEL IS ALSO UNWARRANTED.

The "tag along" question presented in the petition concerns petitioners' claim of malpractice against *Hoffman* class counsel.[22] Petitioners argue that the court below erred in holding that the *Rooker-Feldman* doctrine barred them from bringing that claim in federal district court. That holding does not warrant review by this Court.

There is no conflict between the Seventh Circuit's holding and any other decision. None of the cases cited in the petition involves a malpractice action brought in federal court against class counsel in a state court class action. *Cf. Diaz* v. *Sheppard*, 85 F.3d 1502, 1505 (11th Cir.) (holding that claim of malpractice against counsel to federal court class action must be remanded to state court), *pet. for cert. filed*, 65 U.S.L.W. 3468 (Dec. 20, 1996) (No. 96-1004). Indeed, none of the cases petitioners cite even mentions the *Rooker-Feldman* doctrine.

Furthermore, petitioners are asking this Court to decide whether they may bring in federal court a state law claim that may not even exist. Attorney malpractice is, of course, a claim arising under state law. *See, e.g., Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996) (applying California law), *pet. for cert. filed*, 65 U.S.L.W. 3611 (Feb. 24, 1997) (No. 96-1364); *Diaz*, 85 F.3d at 1505 (attorney malpractice claim, if any, arises under Florida law). Significantly, petitioners have cited no case for the proposition that a malpractice claim against class counsel can be maintained under Alabama law. Since it is unknown if petitioners may sue *Hoffman* class counsel, consideration of the question whether that hypothetical

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[22] Therefore, the underlying claim at issue in the second question presented is not directed at the Bank or respondents T. Thomas Cottingham and Burr & Forman L.L.P., the Bank's counsel in *Hoffman*.

claim may be brought in federal rather than state court is unwarranted.[23]

It is far from clear that a malpractice claim can be brought against class counsel. As Judge Logan noted in *Diaz*:

> Only one court has held that a Rule 23 class member can bring a malpractice action against class counsel. *Zimmer Paper Products, Inc.* v. *Berger and Montague, P.C.*, 758 F.2d 86 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985). That case involved an alleged negligent failure to give notice to a class member; the court *denied relief* after finding that counsel had complied with court orders. In dicta the D.C. Circuit has indicated that it might recognize such a claim, citing *Zimmer Products*. *Peters* v. *National R.R. Passenger Corp.*, 966 F.2d 1483, 1487 n.3 (D.C. Cir. 1992). No case, however, has ever held class counsel liable for malpractice. [85 F.3d at 1507 (dissenting opinion; emphasis added).[24]]

A malpractice claim against class counsel is considerably different from an ordinary attorney malpractice claim, because settling a class action requires a judicial finding that the class was adequately represented. *See, e.g., Reed* v. *General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("the linchpin of an adequate settlement is adequacy of representation"). Thus, a malpractice action against class counsel necessarily implicates the class action judgment. In this case, for example, to find the *Hoffman* class counsel liable for malpractice, petitioners would have to establish that the Alabama court had erred in holding that the plaintiff class was adequately repre-

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[23] This Court recently denied a petition for certiorari filed by a plaintiff suing class counsel for malpractice. *Bennett* v. *Law Firm of Jones, Waldo, Holbrook & McDonough*, 117 S. Ct. 943 (Feb. 18, 1997) (No. 96-678).

[24] *Durkin* v. *Shea & Gould*, which was decided after *Diaz*, involved a malpractice action against counsel for the *defendants* in a class action.

sented and that the settlement (including attorneys' fees) was fair and reasonable. App. A113. It is just such considerations that led the Seventh Circuit to invoke the *Rooker-Feldman* doctrine. *Cf. Laskey* v. *International Union, UAW*, 638 F.2d 954, 957 (6th Cir. 1981) (per curiam) (class members collaterally estopped from claiming malpractice where they had the opportunity to object to the legal representation at settlement hearing and district court found that representation was adequate and that settlement was fair and reasonable).

CONCLUSION

For the foregoing reasons, the petition should be denied.

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No. 96-1184

In The

Supreme Court of the United States

October Term, 1996

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH, III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

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INTRODUCTION

To the extent that respondents address the issue of whether this case warrants the Court's review (as opposed to disputing the allegations of plaintiffs' complaint or arguing the merits of the decision below),[1] they argue that certiorari should be denied because the case is unusual. Petitioners wholeheartedly agree that this case is unusual, but it is the *facts* of the case – not the legal principles at issue – that make it so. Indeed, the *facts* of this case are so egregious as to have prompted Senior Judge Shadur of the United States District Court for the Northern District of Illinois to describe the case as "the sort of Willie Horton of the class action." Milton I. Shadur, *The Unclassy Class Action*, Litig., Winter 1997, Vol. 23, No. 2, at 3.

What is not unusual about this case are the legal doctrines that the Seventh Circuit panel decision implicates and disrupts, legal doctrines that are important and recurring and that warrant this Court's consideration. The purpose of this reply is to show that, contrary to respondents' assertion, certiorari is warranted because this case

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[1] With respect to respondents' factual assertions, at this point petitioners wish only to respond specifically to the statement of respondents Edelman & Combs and Daniel A. Edelman that "[t]he Florida Attorney has proven to be such an embarrassment to petitioners that they have apparently taken the drastic step of terminating his role as their *amicus*." Edelman's Brief in Opposition, at 3. Contrary to respondents' statement, the Florida Attorney General, along with the Attorneys General of twenty-one other states, has filed a brief *amicus curiae* in this Court strongly supporting petitioners.

involves legal questions of enormous and widespread significance strongly meriting this Court's attention.

1. Certiorari is warranted to clarify the due process rights of class members.

This case raises fundamental issues involving the due process rights of class members. It has been over a decade since this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the only case in which this Court has addressed the prerequisites to a state court's exercise of jurisdiction over class members. And it has been half a century since this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), the only case in which this Court has addressed the remedies available to class members who are denied adequate representation in a class action.

Yet, during that same period of time, the class action device increasingly has become the remedy of choice for resolving broad issues involving hundreds of thousands of individuals in venues far removed from the forum in which the class action is pending. *See, e.g., General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (setting aside class action settlement involving plaintiff class of 650,000 owners of GM pick-up trucks with allegedly dangerous side-mounted gas tanks because notice was inadequate); *Judge OKs GM Settlement of Suit on Truck Gas Tanks*, Los Angeles Times, Dec. 28, 1996, at D2 (Louisiana state court approves class action settlement involving allegedly dangerous side-mounted gas tanks on 5.5 million GM trucks); Judith Evans, *Tennessee Judge Approves Plastic Pipe Settlement; Two Firms to Reimburse Homeowners $950 Million,*

Wash. Post, Nov. 10, 1995, at B1 (Tennessee state court approves class action settlement in case involving 6 million homeowners in 21 states for property damage caused by polybutylene water pipes).

Moreover, class actions almost invariably are being settled, not litigated, and settled, as here, on terms and in a manner that raise serious questions of compliance with the due process rights of the members of the class. *See Adams v. Robertson*, 117 S. Ct. 1028 (1997) (dismissing writ of certiorari as improvidently granted); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Products, Inc. v. Windsor*, 117 S. Ct. 379 (1996) (argued Feb. 18, 1997).

In view of the expanded use of state courts to resolve nationwide class actions in which the majority of class members lack minimum contacts with the forum state, this Court should grant the petition in order to address the important issues raised with respect to the rights of class members and the remedies available to them when those rights are violated.[2]

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[2] Respondents persist in asserting that petitioners could have opted out or objected to the settlement. But due process *also* requires adequacy of representation *and* of notice, both of which have been challenged by petitioners. (These challenges were *not* entertained below because of the misapplication of the *Rooker-Feldman* doctrine).

2. Certiorari is warranted to clarify the scope of the *Rooker-Feldman* doctrine.

This Court has had few occasions to address the *Rooker-Feldman* doctrine since its inception. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Yet courts and commentators have struggled with the doctrine. This case presents the ideal vehicle for the Court to address the question of the scope and application of the *Rooker-Feldman* doctrine, including:

a. Is the *Rooker-Feldman* doctrine co-extensive with res judicata? *See Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986) ("We have read *Rooker* . . . as an application of res judicata"). Or are the two doctrines not co-extensive, *see Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996) ("res judicata and the *Rooker-Feldman* doctrine 'are not co-extensive' "), or are they simply similar, *see Valenti v. Mitchell*, 962 F.2d 288, 297 (3d Cir. 1992) (*Rooker-Feldman* has a "close affinity to the principles embodied in the legal concepts of claim and issue preclusion"); *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 n.1 (8th Cir. 1995) (*Rooker-Feldman* and preclusion principles are "extremely similar")?

b. If the *Rooker-Feldman* doctrine and res judicata are co-extensive (or even "extremely similar"), what is the purpose of *Rooker-Feldman*? *See* Note, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of the Federal District Courts*, 42 Rutgers L. Rev. 859 (1990) (criticizing *Rooker-Feldman* as harmful to federal jurisdiction); Jack M. Beerman, *Government Official Torts and the Takings*

Clause: Federalism and State Sovereign Immunity, 68 B.U.L. Rev. 277, 341 (1988) (same); *Cross-Sound Ferry Services, Inc. v. I.C.C*, 934 F.2d 327, 343 (D.C. Cir. 1991) (Thomas, J., concurring) ("when determining the preclusive effect to which state-court judgments are entitled, the Court usually eschews the theory of *Rooker-Feldman* for the more conventional approach of simply applying the substantive preclusion law of the state"). *See also* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4469, at 663-68 (1981); Richard H. Fallon, et al., *Hart & Wechsler's The Federal Courts and the Federal System*, at 1503-04 (4th ed. 1996).

c. If the two doctrines are co-extensive, can the Seventh Circuit be correct that *Rooker-Feldman* bars a federal action that would not be barred under principles of res judicata because the prior state court judgment is not entitled to full faith and credit? *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Underwriters Nat. Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691 (1982).

d. If the two doctrines are *not* co-extensive, can the Seventh Circuit be correct that *Rooker-Feldman*, unlike res judicata, bars a federal action even if the prior state court judgment is not entitled to full faith and credit? *Compare GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993) (*Rooker-Feldman* doctrine "has nothing to do with" full faith and credit) *with Gauthier v. Continental Diving Services, Inc.*, 831 F.2d 559, 561 (5th Cir. 1987) ("*Rooker-Feldman* casts in jurisdictional terms a rule that is very similar if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment").

The lower courts need guidance as to the breadth and effect of the *Rooker-Feldman* doctrine; there is no uniformity in the emerging law. Without such guidance, *Rooker-Feldman* will continue to be applied in confusing and inconsistent ways. And it will be applied even to deny individuals like petitioners here access to the federal courts when the state court judgment was entered without personal jurisdiction, in violation of petitioners' constitutional due process rights.

3. Certiorari is warranted to resolve the conflicts among the circuits about whether persons involved in class actions can bring subsequent malpractice actions against their lawyers.

Nothing in respondents' briefs rebuts the existence of a conflict among the circuits on the question whether a court-approved class settlement bars individuals involved in that action from bringing malpractice claims against their lawyers. Respondents' assertion that the cases petitioners cite on this issue do not involve *Rooker-Feldman* or federal review of a state action is misleading. The Seventh Circuit's holding with regard to plaintiffs' malpractice claims is premised not on a *Rooker-Feldman* specific analysis, but on the more generic proposition that a finding of malpractice would contradict the court-approved settlement. It is this premise that has engendered substantial controversy in the circuits. Specifically, while some courts believe that a successful malpractice action need not disturb a court-approved settlement, *see Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3611 (U.S. Feb. 24, 1997) (No. 96-1364); *Zimmer Paper Products, Inc. v. Berger &*

Montague, 758 F.2d. 86 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985); *see also Diaz v. Sheppard*, 85 F.3d 1502 (11th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3665 (U.S. March 31, 1997) (No. 96-1004), others disagree. *See Laskey v. UAW*, 638 F.2d 954 (6th Cir. 1981); *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litigation)*, 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982). Even respondents concede that the proper resolution of this issue is "far from clear." Bank's Brief in Opposition, at 27.

In an era in which nationwide class actions abound and absent class members are far removed from the attorneys who purport to represent them, it is imperative that the rights and remedies of class members with respect to their attorneys be clarified. This case presents an important opportunity for this Court to do so.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the Petition for a Writ of Certiorari, the petition should be granted.

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No. 96-1184

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE IN OPPOSITION TO BRIEF OF AMICI CURIAE, THE STATES OF NEW HAMPSHIRE, VERMONT, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, MAINE, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, AND WYOMING, AND BRIEF OF AMICI CURIAE, THE LAW TEACHERS

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RESPONSE TO THE AMICI CURIAE BRIEFS FILED BY THE ATTORNEYS GENERAL AND THE LAW TEACHERS

The Amici Are No Friends Of This Court

This point must be made up-front. The several Attorneys General are not true *amici curiae*. An *amicus* is a "friend of the court" who is neither a party to the litigation nor a representative of a party. *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) An *amicus* is impartial and not an advocate for one party rather than another. *Leigh v. Engle*, 535 F. Supp. 418, 419-20 (N.D. Ill. 1982) The several Attorneys General have been tainted by their inclusion of the Florida Attorney General within their number. The Florida Attorney General *has represented parties to this litigation*. The Florida Attorney General appeared in *Hoffman* on behalf of members of the petitioners' class and indeed made the very arguments he now makes as this Court's "friend."

This undisclosed fact disqualifies the Attorneys General as *amici*. *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D. N.J. 1993) One who is "patently partisan . . . should not be allowed to appear as *amicus curiae*." *Id.* at 82.

The fact that the *amici* are advocates rather than advisers to this Court is further illustrated by their briefs. The *amici* have failed to present any original arguments. They merely repeat the assertions advanced in the Petition for Writ of Certiorari. Respondents have addressed those assertions in their Brief in Opposition and will not burden this Court with repetition.

Nevertheless a response is required. The *amici* have misdescribed this case. This is not the case described in

the media sound bites petitioners fed the press. (Attys. Gen. Brf. p.4, n.5) This is not the case the law teachers describe in their published law notes (Attys. Gen. Brf. pp.1-3, n2) The *amici* have distorted this case to force-fit it into their pre-conceived agenda.

Rooker-Feldman Applies—The *Amici* Speak From Both Sides Of Their Mouth

The Attorneys General assert that class counsel, "through malfeasance," failed to represent petitioners' interest (Attys. Gen. Brf. p.15) and then, inconsistently assert that petitioners' lawsuit is "factually independent of the *Hoffman* judgment." The *amici* cannot have it both ways. The federal district court cannot try petitioners' claim of malpractice without litigating the predicate of the claim, i.e. whether the fees were reasonable,—and that was decided by the *Hoffman* court. The issues are intertwined and thus Rooker-Feldman controls. The district court cannot decide that respondents "defrauded the *Hoffman* court" without reconsidering the evidence and determining the value of the class settlement. Stated in the words of District Judge Plunkett, petitioners would have the federal court "undo what the Alabama court did." (Pet. App. 31)

No Challenge To Jurisdiction Or The Adequacy Of Representation

This is not the case described by the *amici* wherein plaintiff obtained a state court judgment without jurisdiction. The issue of jurisdiction was adjudicated by the *Hoffman* court and the Seventh Circuit correctly recog-

nized that it is bound by that co-equal court's adjudication.

The *amici* have also misdescribed this case by asserting that due process was not fairly adjudicated because defendants "controlled the information brought before the court" and that as a consequence the *Hoffman* court could not determine "whether the notice contained false statements of material fact." (Attys. Gen. Brf. p.15, n.12) Respondents did not "control" the information brought before the court. The court appointed Special Master and the Florida Attorney General were not denied access to any evidence. Also, the Florida Attorney General actively conducted an examination of the witnesses and filed a brief wherein he made *the very arguments* he now makes as this Court's alleged *amicus*.

Indeed, the record demonstrates that due process assertions now made to this Court are a contrived afterthought. Review of petitioners' complaint (Pet. App. A49-A105) discloses that petitioners did not challenge the *Hoffman* court's jurisdiction or the adequacy of their representation and petitioners did not ask the court to set the *Hoffman* court's rulings aside. To the contrary, petitioners have consistently asserted that they *do not* seek to set aside the class settlement or any decision by the *Hoffman* court. (Pet. Opening Brf. before 7th Cir. at p.4)

Additionally, there is not even a colorable basis for an allegation of a due process violation. The class notice which is before this Court (Resp. App. 1-3) makes plain on its face that that notice made no assurances but instead stated, in neutral terms, the questions to be decided and in particular the fact that fees, if allowed, would be paid out of the members' escrow accounts.

The Calculation Of Fees

The following statement by the Attorneys General is incorrect:

> Rather than basing the amount of attorney's fees on the actual economic benefit to the class members (that is, on the value of having earlier access to any excess escrow funds) the settlement provided for fees calculated as a percentage *of the total of excess escrow* funds themselves—money which had always belonged to the class. (Attys. Gen. Brf. p.5)

The *Hoffman* court stated that the economic benefit of the settlement is at least as valuable to the class as the immediate refund to the class—but this is a statement of value—not a determination that the fees should be based upon the excess funds. The court based its determination of fees upon the time value of those funds. Moreover, that value, according to the Florida Attorney General, was approximately $32 million. (Doc.39, Exh.B at 2, 3, 13, 14, 18) Thus the fees awarded were far less than one-third of the economic benefit of the settlement.

CONCLUDING REMARKS— CLASS SETTLEMENTS AT PERIL

This is not a case where absent class members were not afforded safeguards. This is a case of extraordinary safeguards—far more than are afforded in the overwhelming majority of settlement hearings. The court appointed a Special Master to advise the court of the fairness of the proposed settlement and fees. Also, *the very arguments* now presented by petitioners were made by those members of the petitioners' class who intervened in *Hoffman* and actively participated in the evidentiary proceedings.

If such settlement is subject to collateral attack, all class settlements are open to collateral attack. Federal courts may review state court judgments; state courts may review federal court judgments. If petitioners succeed they will have destroyed class actions as a vehicle for the protection of consumer rights. No judicially approved class settlement could be deemed final.

The *amici* simply cannot excuse the class members from the consequences of their deliberate decisions: the fact that some members elected to ignore the notice and neither opted out nor objected; the fact that some class members intervened but elected not to appeal the state court's decision. The class members cannot be permitted to retain the benefits of the settlement—which they do not seek to set aside—and collaterally attack the state court's fact intensive determination of the value of the economic benefit.

For these reasons and for the reasons stated and authorities cited in their Brief in Opposition, Respondents respectfully ask this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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